TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1931

No. [redacted] 18

DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, TWELFTH DISTRICT

vs.

DIME TRUST & SAFE DEPOSIT COMPANY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF WILLIAM B. LEWIS, ETC.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

FILED FEB 11, 1931

(35643)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 721

DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, TWELFTH DISTRICT

vs.

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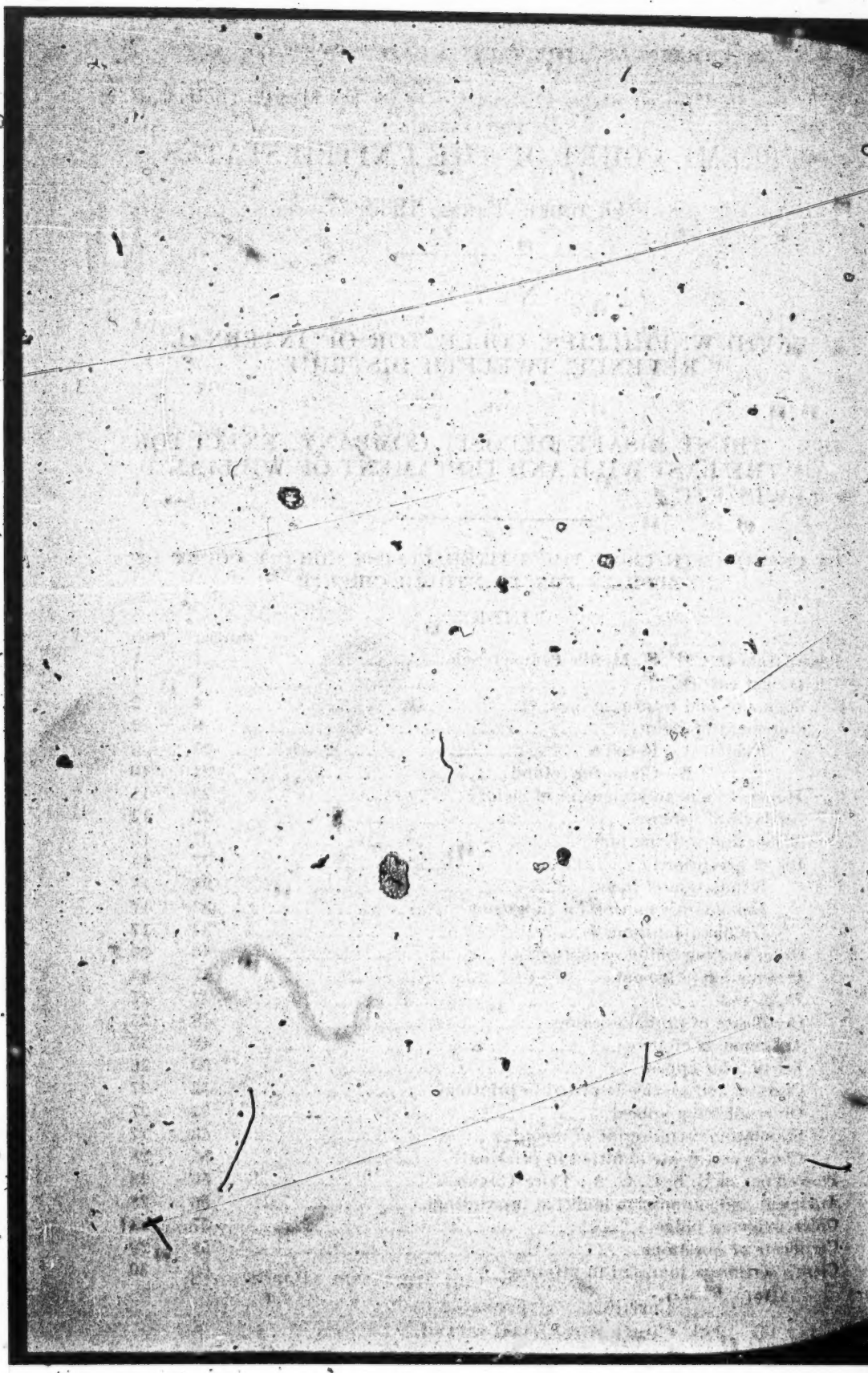
INDEX

	Original	Print
ord from D. C. U. S., Middle Pennsylvania	1	1
Docket entries	1	1
Summons and return	4	3
Statement of claim	6	2
Exhibit A—Receipt	20	9
B—Claim for refund	21	10
Motion to amend statement of claim	23	11
Affidavit of defense	25	12
Stipulation waiving jury	27	13
Bill of exceptions	27	14
Stipulation of facts	28	14
Defendant's motion for judgment	33	17
Opinion, Johnson, J.	34	17
Order settling bill of exceptions	46	24
Praecipe for judgment	47	24
Judgment	47	25
Certificate of probable cause	48	25
Assignments of error	48	25
Petition for appeal	50	26
Citation and service [omitted in printing]	52	27
Order allowing appeal	53	27
Stipulation retranscript of record	53	27
Clerk's certificate [omitted in printing]	55	28
eedings in U. S. C. C. A., Third Circuit	56	28
ment and submission [omitted in printing]	56	28
assigning judge	57	28
ate of questions	58	29
's certificate [omitted in printing]	60	30



In the United States District Court for the Middle District of Pennsylvania

No. 2080, Jan. Term, 1928

DIME TRUST AND SAFE DEPOSIT COMPANY, EXECUTOR OF THE LAST Will and Testament of William B. Le..is, late of Shamokin Township, Northumberland County, Pennsylvania, deceased

vs.

DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, 12TH DISTRICT

Docket entries

Feb. 23, 1928.		Praecipe for summons in assumpsit.
" " "		Summons issued returnable at Scranton, second Monday of March next.
" " "		Plaintiff statement.
" " "		Duplicate original copy of plaintiff's statement handed to U. S. marshal.
" 28	"	Summons returned served, also copy of statement.
2 " "	"	Praecipe for appearance of attorneys for defendant.
Mar. 15	"	Affidavit of defense.
Apr. 2	"	Praecipe for trial list for May term, 1928.
May 9	"	Stipulation to try without a jury.
		Stipulation as to facts.
		Motion of defendant for judgment.
" 10	"	Motion for leave to amend plaintiff's statement and
" " "		Order allowing motion to amend.
Feb. 2, 1929.		Opinion and
" " "		Order that the Dime Trust & Safe Deposit Company have judgment against the defendant, David W. Phillips, collector of internal Revenue, 12th district, for the sum of $18,915.12 with six per cent in per annum from Sept. 10, 1926.
Mar. 1	"	Praecipe for judgment.
" " "		Judgment entered in favor of the plaintiff Dime Trust & Safe Deposit Company and against the defendant, David W. Phillips, collector of internal revenue for the 12th district, in the sum of $18,915.12 with interest from Sept. 10, 1926, in the sum of $2,799.43, making a total of $21,714.55.
3 May 14	"	Petition for appeal and
" "	"	Order allowing appeal.
" " "		Assignments of error.
" " "		Citation issued returnable in thirty days.
" 18	"	Acceptance of notice of appeal and assignments of error by Charles C. Lark, attorney for appellee.
" 20	"	Bill of exceptions and order that same be filed.
		Certificate of probable cause.
May 23, 1929.		Citation returned served.

In the United States District Court

[Title omitted.]

SIR: Issue summons in assumpsit in the above-stated case returnable March 12th, 1928.

CHARLES C. LANE,
Attorney for Plaintiff.

To A. O. Vorse, clerk,
Shamokin, Penna., February 21, 1928.

Summons and return

THE PRESIDENT OF THE UNITED STATES

To the marshal of the middle district of Pennsylvania, Greeting:

We command you that you summon David W. Phillips, collector of internal revenue, 12th district, late of your district, if he
5 may be found therein, so that he be and appear before the judge of the District Court of the United States in and for the Middle District of Pennsylvania, at a session of the same court to be holden at Scranton, Pa., on the second Monday of March next, to answer to Dime Trust & Safe Deposit Company, executor of the last will and testament of William B. Lewis, late of Shamokin Township, Northumberland County, Penna., deceased, of a plea in assumpsit.

And have you then and there this writ.

Witness the honorable the judges of the said court at Scranton, Pa., this 23rd day of February, A. D. 1928, and in the one hundred and fifty-second year of the independence of the United States.

A. O. VORSE,
Clerk United States District Court.

Now, to wit, February 28th, 1928. Served the within summons on the within named David W. Phillips, collector of internal revenue, personally, by reading and making known the contents thereof to the said David W. Phillips and by leaving with the said David W. Phillips a true and attested copy of the within summons together with a copy of a plaintiff statement. Service was made in the city of Scranton, county of Lackawanna, and within the middle district of Pennsylvania.

So answers John H. Glass, U. S. Marshal.

GEORGE GREEN, *Deputy.*

6 In United States District Court

Plaintiff's statement of claim.

The plaintiff, Dime Trust & Safe Deposit Company, executor of the last will and testament of William B. Lewis, late of the township of Shamokin, county of Northumberland, and State of Pennsylvania, deceased, brings this suit against the defendant, David W. Phillips,

collector of internal revenue of the [illegible] district, for the recovery of the sum of [illegible] and fifteen dollars and twelve cents ($[illegible]), with interest thereon from the 10th day of September, [illegible], action whereof the following is a statement:

First. William B. Lewis was, at and before the time of his death, a resident and citizen of the State of Pennsylvania and resided and was domiciled in the township of Shamokin, county of Northumberland, and State of Pennsylvania.

Second. By his last will and testament bearing date August 3, 1925, since his death duly probated and remaining on file in the office of the register of wills of Northumberland County, Pennsylvania, and recorded in the office of the register of wills of Northumberland County in Will Book 19, page 472, William B. Lewis appointed Dime Trust & Safe Deposit Company to be the executor thereof.

Third. William B. Lewis died testate at Shamokin Township, in the county of Northumberland, and State of Pennsylvania, on or about September 28, 1925.

Fourth. After the death of William B. Lewis and the probate of his will, Dime Trust & Safe Deposit Company, duly qualified as the executor of said last will and testament, but no testamentary on the estate of William B. Lewis, deceased, have been granted to Dime Trust & Safe Deposit Company, and it is now acting as such executor.

Fifth. Dime Trust & Safe Deposit Company is a corporation duly organized and existing under the laws of Pennsylvania, with its principal office in the borough of Shamokin, Northumberland County, Pennsylvania.

Sixth. On or about the 5th day of August, 1926, Dime Trust & Safe Deposit Company, the executor of the last will and testament of William B. Lewis, deceased, filed with the defendant, David W. Phillips, collector of internal revenue, twelfth collection district, at Scranton, Pennsylvania, its "Return for Federal Estate Tax" in duplicate.

Seventh. One original of said "Return for Federal State Tax" is in the possession of the defendant and the other in the possession of the commissioner. Both the defendant and the commissioner have been requested to furnish the plaintiff with a certified copy of the said "Return," which requests have been refused, and for that reason the plaintiff is unable to attach hereto a copy thereof. Said "Return" is, however, here specifically referred to and made a part hereof as if fully and completely set out herein.

Eighth. The return of property included in Schedule D-1, "Jointly Owned Property," was made by the plaintiff under protest as will therein more fully and at large appear.

Ninth. The return of jointly owned property included in Schedule D-1, is as follows:

(1) All that certain lot or piece of ground and one-half part of a certain other lot or piece of ground situate in the borough of

Shamokin, county of Northumberland, State of Pennsylvania, the same being lot number two (2) and the northern one-half part of lot number three (3) in block number sixty-five (65) as laid down, designated, and described on the general lithographed plot or plan of the said borough of Shamokin, known as number sixteen (16) South Sixth Street, Shamokin, Pennsylvania, valued at fifteen thousand ($15,000.00) dollars, which said lot and part lot were conveyed to William B. Lewis and Anna Laura Lewis, his wife, by deed of Charles C. Lark and Ruth G. Lark, his wife, by deed dated August 12, 1922, and recorded in the office for the recording of deeds in and for the county of Northumberland, Pennsylvania, in Deed Book No. 208, page 316, on August 19, 1922.

(2) All that certain tract or piece of land situate, lying, and being in the township of Shamokin, county of Northumberland and State of Pennsylvania, bounded and described as follows, to wit: Beginning at a point, a nail stake, in the south side of the public road leading from Shamokin (by the way of the first culvert of the Philadelphia & Reading Railway Company, north of the village of Weigh Scales) to Irish Valley; thence along other lands of the said Edwin Badman, south eight (8°) degrees west, five hundred and twenty-four (524) feet to a point, a stake and pike of stones; thence along other lands of the said Edwin Badman, north seventy-five (75°) degrees and twelve (12″) minutes west, three hundred and eighty (380) feet to a point, a nail stake; thence by other lands of the said Edwin Badman, north eighty-two (82°) degrees west, two hundred and ninety-eight (298) feet to a point, a nail stake; thence by other lands of the said Edwin Badman, north fourteen (14°) degrees and twelve (12″) minutes east, five hundred and ninety-six (596) feet to a point, a nail stake, in the south side of the said public road leading from Shamokin to Irish Valley, by the way of said culvert; thence running along the said public road, south seventy-two (72°) degrees and thirty (30″) minutes east, two hundred and ninety-six (296) feet to a point, a nail stake, in the middle of a private road leading southwardly through the said messuage, tract, or piece of land hereby conveyed; thence running along the said public road, south seventy-one (71°) degrees and ten (10″) minutes east, three hundred and twenty-seven (327) feet to a point, a nail stake, and place of beginning, conveyed to William B. Lewis and Anna L. Lewis, husband and wife, by deed of Edwin Badman and Mary R. Badman, his wife, dated November 5, 1919, and recorded in the office for the recording of deeds in and for the county of Northumberland in Deed Book No. 187, page 8, valued at twenty-five thousand ($25,000.00) dollars.

(3) All that certain property in the county of Pinellas, and State of Florida, described as follows: The east seventy-five (75) feet of [illegible] lot sixteen (16) and the east one-half (E½) of lot fifteen (15) of block thirteen (13) of Hall's Central Addition to [illegible] number two (2) of the city of St. Petersburg, Florida, according to the plat thereof, on file and of record

the office of the clerk of the Circuit Court of [illegible] Florida, in plat book number three (3), page [illegible], conveyed to William B. Lewis and Anna L. Lewis, his wife, by deed of Thomas I. Frost and Edith Frost, his wife, dated December 26, 1923, and recorded in the office of the clerk of the Circuit Court of the Sixth Judicial Circuit, county of Pinellas, State of Florida, on December 31, 1923, in book number 42, page 137, and valued at sixteen thousand ($16,000.00) dollars.

(4) Four thousand fully paid and nonassessable shares of the preferred capital stock of the par value of one hundred ($100.00) dollars each of Wm. F. Taubel, Inc., a New Jersey corporation, evidenced by eight certificates, numbers one to eight, inclusive, each for five hundred shares of seven per cent (7%) preferred stock in said corporation, dated September 18, 1924, issued to William B. Lewis and Anna Laura Lewis, valued at four hundred thousand ($400,000.00) dollars. This stock was originally issued to William B. Lewis and Anna Laura Lewis on September 10, 1921, and a change of name in the corporation having taken place the certificates for the same number of shares and for the same par value were surrendered to the company and the present eight certificates issued in place thereof so that William B. Lewis and Anna Laura Lewis became seized and possessed of said stock on September 10, 1921.

(5) Twenty-one thousand Roaring Creek Water Co., Shamokin, Penna., mortgage bonds due 1959, interest due November and May, at five and one-quarter per cent (5¼%) valued at nineteen thousand nine hundred fifty ($19,950.00) dollars and afterwards increased by the defendant and the commissioner to twenty thousand ($20,000.00) dollars. At the time of the decedent's death there had accrued four hundred and twenty ($420.00) dollars in interest on these bonds.

(6) Bond and mortgage of W. Allen Rich to Dime Trust & Safe Deposit Co., dated February 29, 1924, in the sum of $25,000.00, payable in six months from and after the date thereof, together with interest thereon at the rate of six (6%) per cent per annum, recorded in the office for the recording of deeds in and for the county of Northumberland, Penna., in Mtge. Book 110, page 238, and secured upon all that certain lot or piece of ground situate, lying, and being in the borough of Shamokin, county of Northumberland, and State of Pennsylvania, known, designated, and described on the general plot or plan of the said borough of Shamokin as lot number three (3) in block numbered twenty-three (23).

The above mortgage and bond accompanying the same were duly assigned, transfered, and set over unto William B. Lewis and Anna Laura Lewis, his wife, by assignment in writing, dated May 4, 1926, by Dime Trust & Safe Deposit Company, the mortgagee, which assignment is recorded in the office for the recording of deeds in and for the county of Northumberland in Mortgage Book 116, page 259. The principal amount due upon this mortgage at the time of the death of William B. Lewis was twenty-five thousand

($20,000.00) dollars, and the interest accrued at that time was three hundred fifty-four dollars and fifteen cents ($354.15).

(7) Note and mortgage of Geo. Clark, jr., et al., to William B. Lewis and Anna Laura Lewis, dated February 16, 1923, recorded in the office for the recording of deeds in and for the county of Northumberland in Deed Book 111, page 259, secured upon all that certain lot or piece of ground situate, lying, and being in the borough of Shamokin, county of Northumberland, and State of Pennsylvania, and known, designated, and described upon the general lithographed plot or plan of the said borough of Shamokin as lot number seven (7) in block number twelve (12). At the time of the death of William B. Lewis there was due upon this mortgage the sum of eighteen thousand ($18,000.00) dollars of the principal and one hundred twenty ($120.00) dollars interest.

(8) Note and mortgage of Ralph Rose and Maud Rose, his wife, to William B. Lewis and Anna Laura Lewis, dated January 11, 1924, recorded in the office of the clerk of the Circuit Court in and for the county of Pinellas and State of Florida in book number 13 24, page 225, and secured upon all the following-described land, situate, lying and being in the county of Pinellas and State of Florida, to-wit, the south forty-five feet of lots seventeen (17) and eighteen (18) of block "B" of Jackson's subdivision of the city of St. Petersburg, Florida, according to the plan thereof on file in the office of the clerk of the Circuit Court of Pinellas County, Florida, in plat book No. 1, page five (5).

At the time of the death of William B. Lewis there was due upon the principal of this note and mortgage the sum of six thousand ($6,000.00) dollars and the accrued interest was ninety-eight dollars and sixty-six cents ($98.66).

(9) Note and mortgage of William B. Hughes and Virginia Hustes, his wife, to William B. Lewis and Anna L. Lewis. Mtge. dated April 25, 1924, recorded in the office of the clerk of the Circuit Court of Pinellas County, Florida, in book —, page —.

Mortgage lot six (6) in block eleven (11) of Bayview addition to St. Petersburg, Florida. This mortgage was for the sum of seven thousand ($7,000.00) dollars, and at the time of Mr. Lewis's death there was due in interest two hundred thirty-two dollars and thirty-three cents ($232.33). (Note.—This mortgage has since been paid off to Anna Laura Lewis. The record thereof is, however, specifically referred to and made a part hereof as fully and effectually as if herein fully and completely set out.)

14 (10) Promissory note of Charles C. Lark and R. G. Lark to William B. Lewis and Anna Laura Lewis in the sum of ten thousand ($10,000.00) dollars, dated May 4, 1925. At the time of the death of William B. Lewis the principal amount of said note, to wit, ten thousand ($10,000.00) dollars, together with two hundred thirty-five ($235.00) dollars interest, was due thereon.

(11) Saving account No. 3209 in Dime Trust & Safe Deposit Company standing in the name of William B. Lewis or Anna L. Lewis.

On September 25, 1925, the date of William B. Lewis's death, there was a balance of forty-seven thousand nine hundred sixty-two dollars and eighty cents ($47,962.80) and the accrued interest thereon was eight hundred twelve dollars and thirty-three cents ($812.33).

(12) Checking account of William B. Lewis or Anna Laura Lewis in Dime Trust & Safe Deposit Co. on September 25, 1925, at the close of business showed a balance of fifteen hundred sixty-six dollars and sixty-six cents ($1,566.66).

(13) Household furniture appraised at eighteen hundred seventy-five ($1,875.00) dollars in the name of William B. Lewis and Anna Laura Lewis.

Ninth. The total valuations as fixed by the collector, the defendant, and the Commissioner of Internal Revenue upon the property enumerated in the next preceding paragraph was five hundred ninety-five thousand six hundred twenty-seven dollars and ninety-three cents ($595,627.93) dollars.

Tenth. At the time and times of the vesting of the title to each, every, and all of the several items of property of William B.
15 Lewis and Anna Laura Lewis enumerated and set forth in the next preceding paragraph William B. Lewis and Anna Laura Lewis were husband and wife.

Eleventh. The marriage relation between William B. Lewis and Anna Laura Lewis continued until the date of the death of William B. Lewis, to wit, September 25, 1925.

Twelfth. At the time of the death of William B. Lewis the title to each, every, and all of the items of real and personal property set forth and enumerated in paragraph eight above stood in the names of William B. Lewis and Anna Laura Lewis.

Thirteenth. Upon the filing with the collector of internal revenue, the defendant, of said "Return for Federal Estate Tax," the property enumerated and the return thereof made was verified by an internal revenue officer and upon his verification, the collector assessed and required of the plaintiff, the payment of a tax in the sum of eighteen thousand nine hundred fifteen dollars and twelve cents ($18,915.12).

Fourteenth. Upon demand of the defendant the plaintiff on September 10th, 1926, paid to David W. Phillips, collector of internal revenue, twelfth district, Scranton, Pennsylvania, the defendant, the sum of eighteen thousand nine hundred fifteen dollars and twelve cents ($18,915.12) under protest and took his receipt therefor.

Fifteenth. A true and correct copy of said receipt is hereto attached, made a part hereof and marked "Exhibit A."

16 Sixteenth. Coincident with the payment of said tax, to wit, on the 10th day of September, 1926, and in accordance with the act of Congress and the regulations of the Secretary of the Treasury established in pursuance thereof, the plaintiff lodged and filed with the defendant, the collector of internal revenue where the assessment was made, a petition for a refund of the taxes so assessed and collected, to wit, for the sum of eighteen thousand nine

hundred fifteen dollars and twelve cents ($18,915.12). A true and correct copy of the petition for refund is hereto attached, made a part hereof and marked "Exhibit B."

Seventeenth. The petition for a refund mentioned in the next preceding paragraph was, in due course, forwarded by the defendant to the Commissioner of Internal Revenue at Washington, D. C.

Eighteenth. The petition for a refund mentioned in the sixteenth paragraph of this statement of claim was, in accordance with the act of Congress and the regulations of the Secretary of the Treasury established in pursuance thereof, lodged and filed by the plaintiff with the Commissioner of Internal Revenue at Washington, D. C., on or about the 10th day of September, 1926.

Nineteenth. The plaintiff has complied with the provisions of section 3226 of the Revised Statutes as amended by the revenue act of 1924, section 1014, and reenacted by section 1113 of the revenue act of 1926 and the regulations of the Secretary of the Treasury made in pursuance of said section by the lodging of an appeal (claim for refund) made out in due form with the defendant, the proper collector of internal revenue, for the purpose of transmission of the Commissioner of Internal Revenue in the usual course of business under the requirements of the regulations of the Secretary of Treasury which is in legal effect a presentation of the appeal to the commissioner.

Twentieth. More than six months have elapsed since the date of filing such claim for refund without the commissioner having rendered a decision thereon.

Twenty-one-half. The Commissioner of Internal Revenue has decided the claim of your petitioner adversely, to wit:

Twenty-first. The Commissioner of Internal Revenue has refused to allow said petition or repay the said sum of eighteen thousand nine hundred fifteen dollars and twelve cents ($18,915.12) with the interest thereon.

Twenty-second. The assessment and collection of the said sum of eighteen thousand nine hundred fifteen dollars and twelve cents ($18,915.12) against and from the plaintiff by the defendant was and is illegal and erroneous.

(a) Because upon the death of William B. Lewis none of the property mentioned and described in paragraph eight hereof was transferred from William B. Lewis to Anna Laura Lewis, nor was any of the property subject to distribution as part of his estate;

(b) Because none of the property mentioned and enumerated in paragraph eight hereof and held by her and William B. Lewis, her husband, by the entireties, passed to Anna Laura Lewis, the [illegible] upon the death of William B. Lewis, as she took and [illegible] of the entire estate under the original grants [illegible] vesting the estate therein;

(c) Because the property upon which the said tax is based was [illegible] William B. Lewis and Anna Laura Lewis by the entireties [illegible]

(d) Because William B. Lewis and Anna Laura Lewis were husband and wife when the property mentioned and described in paragraph eight hereof vested in them, and since they held the property together as husband and wife, after the death of William B. Lewis, Anna Laura Lewis, the survivor, took the property without acquiring any new rights or any rights of property of William B. Lewis or any rights which she did not before possess;

(e) Because upon the death of William B. Lewis, his interest in said property was annihilated—wiped out—and passed to no one, and on his death Anna Laura Lewis became vested of the property not because there was a transfer of any of the estate, but because she, as survivor, was the representative of the single ownership;

(f) Because of the act of Congress taxes, not the property but the transmission or receipt thereof, and there having been no transmission from Willaim B. Lewis of said property or the receipt thereof by Anna Laura Lewis, there can be no tax;

(g) Because Congress has no power, under the guise of an estate tax, to tax an estate by entireties upon death of one of the parties and in so far as it attempts to do so, the revenue act of 1924 is unconstitutional and void in that it violates the fifth and fourteenth amendments of the Constitution of the United States and attempts to take the property of Anna Laura Lewis without due process of law and without making due compensation therefor.

Wherefore and by reason of the premises, the plaintiff is entitled to the return of eighteen thousand nine hundred fifteen dollars and twelve cents ($18,915.12), together with interest thereon from the 10th day of September, 1926, for the recovery of which this suit is brought.

CHARLES C. LARK,
Attorney for Plaintiff.

[*Duly sworn to by John L. Sheef; jurat omitted in printing.*]

Exhibit A to statement of claim

Treasury Department, U. S. Internal Revenue, Form 805, Revised August, 1925.

Estate Tax Receipt

Executor's Copy

(in duplicate)

Collector 12th district of Pennsylvania at Scranton, Pa. Actual date of payment, Sept. 10, 1926.

NOTE.—Payment upon the basis of the return on Form 706 is not conclusive as to ultimate tax liability. An investigation will be conducted to verify the accuracy of the return. If a deficiency or an

excess payment is disclosed by the commissioner's audit, due notice thereof will be given.

Lewis, William B. Est. of, Dime Trust & Safe Deposit Co., Exrs., Shamokin, Pa.

List 23A, Sept. 26 _____ (Month) (Folio) (Line)

Date of death, Sept. 25, 1925.
Returned tax, $19,428.29.

Interest _____ $_____ (Period rate)

Deficiency tax $_____

Interest & _____ $_____ (Period rate)

All other interest $_____

21 Total paid, $19,428.29; $18,915.12 paid under protest.
Received payment.

_____,
Collector of Internal Revenue.

2-8971 G. P. O.

Collector of Internal Revenue

Paid September 10, 1926, 12th District of Penna.

Exhibit B to statement of claim

CLAIM FOR REFUND OF TAXES ILLEGALLY COLLECTED

STATE OF PENNSYLVANIA,
County of Northumberland, ss:

Lewis, Wm. B., Estate of, Dime Trust & Safe Deposit Co., Executor, Market and Independence Streets, Shamokin, Pa.

This deponent, being duly sworn to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged _____
2. Character of assessment or tax, Estate tax.
3. Amount of assessment or stamps purchased, $19,428.29.
22 4. Reduction of tax liability requested (income and profits tax) _____ $_____
5. Amount to be abated _____ $_____
6. Amount to be refunded (or such greater amount as is legally refundable), $18,915.12.

7. Dates of payment (see collector's receipts or indorsements of canceled checks), Sept. 10, 1926.
8. District in which return (if any) was filed, 12th district, Scranton, Penna.
9. District in which unpaid assessment appears.....
10. Amount of overpayment claimed as credit.....
11. Unpaid assessment against which credit is asked; period from ..... to ..... $.....

Deponent verily believes that this application should be allowed for the following reasons:

$18,915.12 was paid under protest and ought to be refunded for the reason that it is illegal, erroneous, and void, (a) because Congress has no power under the guise of State taxes to tax an estate by entireties upon the death of one of the parties; (b) because none of the property held by the entireties passed to Anna Laura Lewis, the survivor, upon the death of Wm. B. Lewis, her husband, as she took and became vested of the entire estate under the original grants; (c) because collection of this tax is taking the property of Anna Laura Lewis, the survivor, without due process of law; (d) because the property upon which the tax is paid was vested in Wm. B. Lewis, and Anna Laura Lewis, his wife, by entireties prior to the passage of the act of Congress under which this tax is assessed and paid; and (e) because in other respects this tax is illegal.

(Signed) JOHN L. SHEEW, [SEAL.]
Treasurer of Dime Trust & Safe Deposit Co., Executor.

Sworn to and subscribed before me this 14th day of September, 1926.

[SEAL.] ROBERT M. FORTNEY,
Notary Public.

My commission expires March 2, 1929.

To the within defendant:

You are required to file an affidavit of defense to this statement of claim within fifteen (15) days from the service hereof.

CHARLES C. LARK,
Attorney for Plaintiff, Shamokin, Penna.

In United States District Court

Motion to amend plaintiff's statement

[Title omitted.]

And now, to wit, the plaintiff by its counsel, Charles C. Lark, moves the court to amend its statement of claim as follows:

First. That the word "eight" in the third line of paragraph twelfth between the words "paragraph" and "above" be stricken out and the word "ninth" inserted in place thereof.

Second. That the word "eight" in the second line of section eight of paragraph twenty-second between the words "paragraph" and

"hereof" be stricken out and the word "ninth" inserted in place thereof.

Third. That the word "eight" in section B of paragraph twenty-second in the first line of page eleven of the statement of claim between the words "paragraph" and "hereof" be stricken out and the word "ninth" inserted in place thereof.

Fourth. That the word "eight" in the third line of section D of paragraph twenty-second between the words "paragraph" and "hereof" be stricken out and the word "ninth" inserted in place thereof.

Fifth. That in paragraph ten, fourth line of words "next preceding," between the word "the" and the word "paragraph" be stricken out and the word "ninth" inserted in the place thereof.

Sixth. That the second ninth paragraph on page eight of the statement of claim be numbered nine and one-half instead of nine.

CHARLES C. LARK,
Attorney for Plaintiff.

And now, to wit, May ——, 1928, the above motion presented and upon consideration thereof it is ordered that the plaintiff's statement of claim be amended as prayed for in the above and foregoing motion.

By the court.

---

25 And now, May 10, 1928, the within motion allowed and the statement of claim amended as therein stated.

ALBERT M. JOHNSON,
District Judge.

Filed May 10, 1928, A. O. Vorse, Clerk.

In United States District Court

Affidavit of defense

COMMONWEALTH OF PENNSYLVANIA,
County of Lackawanna, ss:

David W. Phillips, being duly sworn according to law, declares and says that he is the defendant in the above-entitled cause and that he has a just, true, and legal defense to the whole of the plaintiff's claim of the character and nature as follows:

I

The averments in paragraph first to eight, inclusive, and in paragraph eleventh to twenty-first, inclusive, are admitted.

II

The averments in paragraph ninth are admitted except those contained in subdivisions (12) and (13) of said paragraph ninth, as

to which the defendant has no knowledge, and can neither admit nor deny, but leaves the plaintiff to prove the same.

III

The averments in paragraph ninth (the second paragraph so designated) are denied and in answer thereto the defendant
26 alleges and avers and expects to prove at the trial of this cause that the Commissioner of Internal Revenue determined the value of the said property at $596,086.28 instead of $596,627.93 as alleged in said paragraph ninth.

IV

The averments in paragraph tenth are admitted except those as to the checking account and household furniture referred to in subdivisions (12) and (13) of paragraph ninth, as to which the defendant has no knowledge, and can neither admit nor deny, but leaves the plaintiff to prove the same.

V

The averments of paragraph twenty-second are denied and in answer thereto the defendant alleges and avers and expects to prove at the trial that the full value of the property jointly owned by the decedent and his wife or owned by them as tenants by the entirety was properly included in the decedent's gross estate under the provisions of section 302 (e) of the revenue act of 1924.

VI

And further answering, the defendant says that the assessments and collections of estate taxes herein referred to and each and all of them were in all respects legal and valid and that they were made pursuant to the provisions and requirements of the revenue act of 1924.

I, therefore, owe the plaintiff nothing.

27 All of the above statements are correct and true and the defendant avers and expects upon the trial of this cause to be able to prove the same.

DAVID W. PHILLIPS.

Sworn and subscribed before me this 15th day of March, 1928.

S. W. HUFFORD, *Dep. Clerk.*

In United States District Court

Stipulation to try without jury

And now, to wit, May 9, 1928, it is agreed between counsel for the plaintiff and counsel for the defendant, that the above-stated case

shall be heard by the court without a jury on the facts as agreed upon.

CHARLES C. LARK,
Attorney for Plaintiff.
JAMES SMITH,
Special Attorney,
A. B. DUNSMORE,
U. S. Attorney,
Attorneys for Defendant.

In United States District Court

Bill of exceptions

Be it remembered that on the trial of this cause in this court at the regular January, A. D. 1928, term thereof, holden at the city of Scranton, Pennsylvania, before the Honorable Albert W. Johnson, district judge, the following proceedings were had:

The services of a jury were waived by written stipulation filed with the clerk and the cause was tried to the court without a jury on the 10th day of May, A. D. 1928.

28 The following proceedings were had at the trial:

Appearances: For plaintiff, Charles C. Lark, Esq., attorney for plaintiff; for defendant, Andrew B. Dunsmore, Esq., United States attorney, attorney for defendant.

At the trial the following stipulation of facts was filed by the parties through their respective counsel:

[Title omitted.]

Appearances: For plaintiff, Charles C. Lark, Esq.; for defendant, Andrew B. Dunsmore, Esq., U. S. attorney; A. A. Vosburg, Asst. U. S. attorney.

Stipulation of facts

And now, to wit, May 9, 1928, it is agreed between counsel for the plaintiff and counsel for the defendant that the following are
29 the facts in the above-stated case, the parties hereto reserving the right, however, to introduce into evidence such further facts not inconsistent herewith as they may deem advisable.

1st. William B. Lewis was, at and before the time of his death, a resident and citizen of the State of Pennsylvania, and resided and was domiciled in the township of Shamokin, county of Northumberland, and State of Pennsylvania.

2nd. By his last will and testament, bearing date of August 8, 1925, since his death duly probated and remaining on file in the office of the register of wills of Northumberland County, Pennsylvania, recorded in the office of said Register of Wills Book 19, page 472, William B. Lewis appointed the Dime Trust and Safe Deposit Company to be the executor thereof.

3rd. William B. Lewis died testate at Shamokin Township, Northumberland County, Pennsylvania, on September 25, 1926.

4th. After the death of William B. Lewis, and the probate of his will, Dime Trust & Safe Deposit Company duly qualified as the executor of said last will and testament; letters testamentary on the estate of said decedent have been granted to Dime Trust and Safe Deposit Company and it is now acting as such executor.

5th. On or about August 5, 1926, Dime Trust & Safe Deposit Company, the executor of the last will and testament of William B. Lewis, deceased, filed with the defendant, David W. Phillips, collector of internal revenue, twelfth collection district, at Scranton, Pa., its "Return for Federal Estate Tax, in duplicate."

30 6th. The return of property included in Schedule D-1 "Jointly owned property" was made by the plaintiff under protest.

7th. The return of jointly owned property included in Schedule D-1 is as set out in the 9th paragraph of the plaintiff's statement of claim.

8th. (a) Items 1, 2, 3, 6, 7, 8, and 9 mentioned in paragraph 9th of the plaintiff's statement of claim were acquired by William B. Lewis and Anna Laura Lewis, his wife, prior to the passage of the revenue act of 1924 of June 2, 1924.

(b) Item 4, consisting of preferred stock in William F. Taubal, Inc., while dated September 18, 1924, was acquired by William B. Lewis and Anna Laura Lewis, his wife, on September 10, 1921; the certificates dated September 18, 1924, having been issued in place of similar certificates of stock in the same corporation by reason of a change of the name of the corporation, the former certificate having been issued on September 10, 1921.

(c) Item 5 of paragraph 9, consisting of twenty (20) $1,000.00 Roaring Creek Water Company mortgage bonds, due 1959, were acquired September 6, 1924. They were purchased out of funds of William B. Lewis or Anna Laura Lewis on deposit in Dime Trust & Safe Deposit Company.

(d) Item No. 11, consisting of saving account No. 3329 in Dime Trust & Safe Deposit Company, standing in the name of William B. Lewis or Anna L. Lewis, at the time of Mr. Lewis's death, showed a balance of $47,962.80, and the accrued interest

31 thereon was $812.33. This savings account was opened in 1910 in the names of William B. Lewis or Anna Laura Lewis.

(e) Item No. 12, of said paragraph 9th of plaintiff's statement of claim, consisting of a checking account standing in the name of William B. Lewis or Anna Laura Lewis, in Dime Trust and Safe Deposit Company, at the time of Mr. Lewis' death, showed a balance of $1,566.66. This account was opened in the names of William B. or Anna Laura Lewis in 1910.

[illegible] mentioned in Item 12 of paragraph 9 of the plaintiff's statement of claim, the value of which was finally determined by the commissioner at $2,975.00, was purchased with funds of William B. Lewis and Anna Laura Lewis, about 1920, from the savings account in Dime Trust & Safe Deposit Company.

(g) Item 10 mentioned in the 9th paragraph of plaintiff's statement of claim, the same being a note in the sum of $10,000.00 dated May 4, 1925, was taken by William B. Lewis and Anna Laura Lewis for funds loaned out of their savings account in Dime Trust and Safe Deposit Company, accumulated prior to June 2, 1924.

9th. The value for assessment purposes, as finally determined by the commissioner, of the items mentioned in paragraph 9th of the plaintiff's statement of claim, was $[illegible]28.

10th. William B. Lewis and Anna Laura Lewis were married in 1896, and the marriage relation continued until the date of the death of William B. Lewis on September 25, 1925.

11th. At the time and times of the vesting of the title to each, every, and all of the several items of property of William B. Lewis and Anna Laura Lewis, enumerated and set forth in paragraph 9 of the statement of claim, William B. Lewis and Anna Laura Lewis were husband and wife.

12th. The title to each, every, and all of the items of real and personal property set forth and enumerated in paragraph 9th of the statement of claim, excepting the furniture, stood in the names of William B. Lewis and Anna Laura Lewis from the date of the inception of the title of the various items of property until the date of his death.

13th. The tax assessed by the commissioner, and paid to the collector, on the jointly owned property as enumerated in paragraph 9 of the plaintiff's statement of claim was $18,915.12, which was paid to the collector on September 10, 1926, under protest.

14th. The copy of the receipt of the collector to the plaintiff, attached to plaintiff's statement of claim, marked "Exhibit A," is a true and correct copy of the receipt given by the collector to the plaintiff for said tax.

15th. On September 10, 1926, in accordance with the act of Congress and the regulations of the Secretary of the Treasury established in pursuance thereof, the plaintiff filed with the collector a claim for refund of the taxes so assessed and collected, to wit, for the sum of $[illegible], a true and correct copy of said claim being attached to the statement of claim and marked "Exhibit B." The claim for refund was in due course transmitted by the defendant to the Commissioner of Internal Revenue at Washington, D. C.

16th. [illegible] for a refund was, in accordance with the [illegible] and the regulations of the Secretary of the Treasury established in pursuance thereof, lodged and filed with the Commissioner of Internal Revenue in Washington, D. C., on [illegible], 1926.

[illegible]

17th. More than six months have elapsed since the filing of the claim for refund without the [illegible] a decision thereon, and consequently the [illegible] said claim for refund in its entirety.

[illegible]
Attorney for the Plaintiff.
A. B. Dunmore,
U. S. Attorney.
J. Banks Shoop,
Special Assistant
Attorneys for the Defendant.

TESTIMONY CLOSED.

At the close of the trial the defendant submitted the following motion for judgment.

Motion for judgment.

Now comes the defendant and moves the court for judgment against the plaintiff dismissing the plaintiff's statement of claim filed herein and to recover from said plaintiff the costs herein expended for the reason that there is not sufficient evidence to warrant judgment in favor of the plaintiff.

ANDREW B. DUNMORE,
United States Attorney, Attorney for Defendant.

34 The cause was then argued by counsel for the respective parties.

Defendant's motion for judgment was overruled and an exception noted.

Thereafter and on the 2nd day of February, 1929, the following findings of fact, opinion, and order were rendered and filed in this cause with exceptions saved to the defendant:

FINDINGS OF FACT AND OPINION.

(Filed February —, 1929)

In United States District Court, for the Middle District of Pennsylvania.

No. 2080, January Term, 1928. Assumpsit.

DIME TRUST & SAFE DEPOSIT COMPANY, EXECUTOR OF THE LAST WILL and testament of William B. Lewis, deceased

vs.

DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, FIFTH DISTRICT

Opinion of the Court.

This is an action of assumpsit brought by the Dime Trust & Safe Deposit Company, plaintiff, against David W. Phillips, [illegible]

of internal revenue, 12th District, defendant, to recover the sum of $16,915.12 which was paid to the collector of internal revenue, under protest, on September 10th, 1926, with interest from September 10, 1926.

35 The facts in this case have been agreed upon in a case stated which has been submitted to the court for trial and decision without a jury. The case stated and the facts agreed upon are as follows:

"And now, to wit, May 9, 1928, it is agreed between counsel for the plaintiff and counsel for the defendant that the following are the facts in the above-stated case, the parties hereto reserving the right, however, to introduce into evidence such further facts not inconsistent herewith as they may deem advisable.

"1st. William B. Lewis was, at and before the time of his death, a resident and citizen of the State of Pennsylvania, and resided and was domiciled in the township of Shamokin, county of Northumberland, and State of Pennsylvania.

"2nd. By his last will and testament, bearing date of August 8, 1925, since his death duly probated and remaining on file in the office of the register of wills of Northumberland County, Pennsylvania, recorded in the office of said register in will book 19, page 472, William B. Lewis appointed the Dime Trust and Safe Deposit Company to be the executor thereof.

"3rd. William B. Lewis died testate at Shamokin Township, Northumberland County, Pennsylvania, on September 25, 1925.

"4th. After the death of William B. Lewis and the probate of his will Dime Trust & Safe Deposit Company duly qualified as the executor of said last will and testament; letters testamentary on the estate of said decedent have been granted to Dime Trust & Safe Deposit Company, and it is now acting as such executor.

36 "5th. On or about August 5, 1926, Dime Trust & Safe Deposit Company, the executor of the last will and testament of William B. Lewis, deceased, filed with the defendant, David W. Phillips, collector of internal revenue, twelfth collection district, at Scranton, Pa., its 'Return for Federal estate tax, in duplicate.'

"6th. The return to property included in Schedule D-1, 'Jointly owned property,' was made by the plaintiff under protest.

"7th. The return of jointly owned property included in Schedule D-1 is as set out in the 9th paragraph of the plaintiff's statement of claim.

"8th. (a) Items 1, 2, 3, 6, 7, 8, and 9, mentioned in paragraph 9th of plaintiff's statement of claim, were acquired by William B. Lewis and Anna Laura Lewis, his wife, prior to the passage of the revenue act of 1924, to wit, June 2, 1924.

"(b) Item 4, consisting of preferred stock in William F. Taubel, Inc., which dated September 18, 1924, was acquired by William B. Lewis and Anna Laura Lewis, his wife, on September 10, 1921, the certificates dated September 18, 1924, having been issued in place of similar certificates of stock in the same corporation by reason of a

change of name of the corporation, the former certificate having been issued on September 10, 1921.

"(c) Item 5 of paragraph 9, consisting of twenty (20) $1,000.00 Roaring Creek Water Company mortgage bonds, due 1926, were acquired September 6, 1924. They were purchased out of funds of William B. Lewis or Anna Laura Lewis on deposit in Dime Trust and Safe Deposit Company.

87 "(d) Item No. 11, consisting of savings account No. 2028 in Dime Trust & Safe Deposit Company, standing in the name of William B. Lewis or Anna L. Lewis at the time of Mr. Lewis' death, showed a balance of $47,962.80 and the accrued interest thereon was $812.33. This savings account was opened in 1910, in the name of William B. Lewis or Anna Laura Lewis.

"(e) Item No. 12 of said paragraph 9th of plaintiff's statement of claim, consisting of a checking account standing in the name of William B. Lewis or Anna Laura Lewis, in Dime Trust & Safe Deposit Company, at the time of Mr. Lewis' death showed a balance of $1,566.66. The account was opened in the names of William B. or Anna Laura Lewis in 1910.

"(f) The household furniture mentioned in item 13 of paragraph 9 of the plaintiff's statement of claim, the value of which was finally determined by the commissioner at $2,975.00, was purchased with funds of William B. Lewis and Anna Laura Lewis, about 1920, from the savings account in Dime Trust and Safe Deposit Company.

"(g) Item 10 mentioned in the 9th paragraph of plaintiff's statement of claim, the same being a note in the sum of $10,000.00, date May 4, 1925, was taken by William B. Lewis and Anna Laura Lewis for funds loaned out of their savings account in Dime Trust & Safe Deposit Company accumulated prior to June 2, 1924.

"9th. The value for assessment purposes, as finally determined by the commissioner, of the items mentioned in paragraph 9th of the plaintiff's statement of claim was $596,066.23.

88 "10th. William B. Lewis and Anna Laura Lewis were married in 1886, and the marriage relation continued until the date of the death of William B. Lewis on September 25, 1925.

"11th. At the time and times of the vesting of the title to each, every, and all of the several items of property of William B. Lewis and Anna Laura Lewis enumerated and set forth in paragraph 9 of the statement of claim William B. Lewis and Anna Laura Lewis were husband and wife.

"12th. The title to each, every, and all of the items of real and personal property set forth and enumerated in paragraph 9th of the statement of claim, excepting the furniture, stood in the names of William B. Lewis and Anna Laura Lewis from the date of the inception of the title of the various items of property until the date of his death.

"13th. The tax assessed by the commissioner, and paid to the collector, on the jointly owned property as enumerated in paragraph 9

of the plaintiff's statement of claim was $18,915.12, which was paid to the collector on September 10th, 1926, under protest.

"14th. The copy of the receipt of the collector to the plaintiff, attached to plaintiff's statement of claim, marked "Exhibit A," is a true and correct copy of the receipt given by the collector to the plaintiff for said tax.

"15th. On September 10, 1926, in accordance with the act of Congress and the regulations of the Secretary of the Treasury established in pursuance thereof, the plaintiff filed with the collector a claim for refund of the taxes so assessed and collected, to-wit, for the sum of $18,915.12, a true and correct copy of said claim being attached to the statement of claim and marked "Exhibit B2." The claim for refund was, in due course, forwarded by the defendant to the Commissioner of Internal Revenue at Washington, D. C.

"16th. The claim for a refund was, in accordance with the act of Congress and the regulations of the Secretary of the Treasury established in pursuance thereof, lodged and filed with the Commissioner of Internal Revenue in Washington, D. C., on or about September 10, 1926.

"17th. More than six months have elapsed since the date of filing the claim for refund without the commissioner having rendered a decision thereon, and subsequently the commissioner has rejected said claim for refund in its entirety."

Section 301-a and section 302-c of title 3, part 1, estate tax, of the act of June 2nd, 1924, constitute the provisions of the law under which the tax in question was assessed and collected. These sections, in so far as they are pertinent, provide as follows:

"Section 301. (a) In lieu of the tax imposed by Title IV of the revenue act of 1921, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this act, whether a resident or nonresident of the United States.

"Section 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(c) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited with any person carrying on the banking business, in their joint names and payable to either or the survivors, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth."

The question presented to the court for decision is, whether the personal and real property owned and held by William B. Lewis and Anna Laura Lewis, husband and wife, as tenants by entireties

under the laws of Pennsylvania, is taxable under the provisions of the act of Congress cited, was the death of the husband, December 25th, 1925.

The Government is endeavoring to tax the interest of one tenant by entirety at his decease on its transfer to the wife, the other tenant by entirety. Under the laws of Pennsylvania there is no transfer or passing of any interest or estate from one tenant by entirety to the other on the death of either. The estate of tenants by entireties is a unit and not divisible; the whole continues in the survivor and the estate of a deceased tenant by entirety ceases and is not transferred.

In Stuckey *vs.* Keefe's Executors, 26 Pa., 397, the tenancy of husband and wife by entireties was defined by the Supreme Court of Pennsylvania, and the legal consequence of such tenancy stated by Lewis, chief justice, as follows:

"A conveyance to husband and wife creates neither a tenancy in common nor a joint tenancy. The estate of joint tenants is
.41 a unit made up of divisible parts; that of husband and wife is also a unit, but it is made up of indivisible parts. In the first case there are several holders of different moieties or portions, and upon the death of either the survivor takes a new estate. He acquires by surivorship the moiety of his deceased cotenant. In the last case, although there are two natural persons, they are but one person in law, and upon the death of either the survivor takes no new estate. It is a mere change in the properties of the legal person holding and not an alteration in the estate holden. The loss of an adjunct merely reduces the legal personable holding the estate to an individuality identical with the natural person. The whole estate continues in the survivor the same as it would continue in a corporation after the death of one of the corporation. 1 Dana 244; 7 Yeager 319. This has been the settled law for centuries. The distinction may seem a nice one, but it is founded upon the nature of marriage and the rights and incapacities which it establishes. Co. Lit. 6; 1 Thom. Coke 853; 2 Bl. Com. 182; 5 T. R. 652; 2 Vern 238; Skin. 182; 19 Wend. 175; 3 Rand. 184; 5 John. Ch. R. 438; 7 Yeager 319; 1 Barr 176; 6 W. & Ser. 319."

In Beihl *vs.* Martin, 236 Pa. 519, Mr. Justice Stewart, delivering the opinion of the Supreme Court of Pennsylvania, states the nature of an estate by entireties in Pennsylvania in the following language:

"It may be that because of modern innovations on the common law respecting the property rights of married women, the venerable estate known as estate by entireties has outlived the purpose of its creation and is out of harmony with present conditions. How-
ever this may be, if change is desired it must come through
.42 legislative action and not through judicial construction. This estate is too well established and too well defined to be subject to judicial impertinence. Recognizing its very ancient character, we have been entitled, as all our cases show, to give effect to those peculiar incidents which naturally and logically attach, and

chiefly to its chief distinguished incident which exempts it from the ordinary legal process to which all other estates are subject. Fundamentally the estate rests on the legal unity of husband and wife; it is therefore a unit, not made up of divisible parts subsisting in different natural persons, but is an indivisible whole, vested in two persons actually distinct, yet to legal intendment one and the same. Each is seised of the whole estate from its inception, and upon the death of one, while the right of survivorship remains to the other, that other takes no new title or estate. 'A conveyance to husband and wife creates neither a tenancy in common nor a joint tenancy. The estate of joint tenants is a unit made up of divisible parts; that of husband and wife is also a unit, but it is made up of indivisible parts. In the first case there are several holders of different moieties or portions, and upon the death of either the survivor takes a new estate. He acquires by survivorship the moiety of his deceased cotenant. In the last case, although there are two natural persons, they are but one person in law, and upon the death of either the survivor takes no new estate. It is a mere change in the properties of the legal person holding and not an alteration in the estate holden. The loss of an adjunct merely reduces the legal personage holding the estate to an individuality identical with the natural person. The whole estate continues in the survivor the same as it would continue in a corporation after the death of one of the corporators. This has been the settled law for centuries'; Stuckey vs. Keefe, 26 Pa. 397."

In Gasner, appellant, vs. Pierce et al., 286 Pa. 529, Mr. Justice Sadler, speaking for the Supreme Court of Pennsylvania, defined an estate by entireties as follows:

"The property in question was admittedly owned by Mr. and Mrs. Pierce, and, as a result, a tenancy by entireties arose, which has been defined as an interest held by a husband and wife together so long as both live, and after the death of either by the survivor so long as the estate lasts: 13 R. C. L. 1096. 'The essential characteristic of (the estate) is that each spouse is seized of the whole or the entirety and not of a share moiety, or divisible part. There is but one estate, and, in contemplation of law, it is held by but one person': 30 C. J. 564; 13 R. C. L. 1114. This interest, arising from the unity of person, has not been abolished by our so-called married women's acts (13 R. C. L. 1101) passed April 11, 1848, P. L. 536 (Diver vs. Diver, 56 Pa. 106), June 3, 1887, P. L. 382 (Bramberry's Estate, 150 Pa. 626), or June 8, 1893, P. L. 344; Myer's Est. (No. 1), 239 Pa. 89. Nor is it affected by the more recent legislation (May 24, 1923, P. L. 443; May 13, 1925, P. L. 5649) authorizing the sale of such estates, when ordered to secure support of the wife, or after divorce has been granted.

"Neither husband nor wife, in whom property has jointly vested, can sell or assign their individual rights therein without the joinder of the other, or dispose even of the expectancy of survivorship (Reibl vs. Martin, 286 Pa. 519) and creditors of either acquire

no enforceable lien by [illegible] execution. McCurdy *vs.* [illegible] such party to the present [illegible] insurance, is not to a part, but to all of it. [illegible] Myer's Estate (No. 2), [illegible]

Under the law in Pennsylvania an estate by entirety [illegible] indivisible and on the death of either spouse the estate is [illegible] and no new estate is acquired by the survivor. The [illegible] sylvania must be accepted as the law in this case so far as it relates to the nature and incidents of an estate by entireties. Chaffin *vs.* Clarke, 178 U. S. 186.

Since under the law of Pennsylvania an estate by entireties is a unit and indivisible and upon the death of one of the tenants the interest or estate of the deceased tenant cease and there is no transfer of any estate, or any part thereof, to the survivor, the survivor has the entire estate and takes no new estate. The value of such estate may not be included in the gross estate of the decedent and hence there is nothing upon which to impose an estate tax under the revenue act of 1924.

This position is supported by the decisions of the United States Board of Tax Appeals and Appeal of George R. Dyer, H. Kierstede Hudson, and T. Hendry Walter, executors of estate of Charles L. Hudson, 5 U. S. Board of Tax Appeals Reports, 711; appeal of James C. Murphy and Mercantile Trust & Deposit Co., of Baltimore, executors estate of John H. Windfelder, 5 U. S. Board of Tax Appeals Reports, 952; appeal of Provident Trust Company of Philadelphia and Charles Sinkler, administrators estate of James K. Young, 5 U. S. Board of Tax Appeals Reports, 1004; appeal of Harry A. Smith and Ethel G. Meisel, executors estate of Edward Meisel, petitioners, *vs.* Commissioner of Internal Revenue, respondent, 6 U. S. Board of Tax Appeals Reports, 541; and also by opinion of Coleman, district judge, in James E. Tyler, jr., and William G. Tyler, administrators of the estate of James E. Tyler, deceased, *vs.* United States of America, in the District Court of the United States for the District of Maryland, filed October 19, 1928.

In appeal of the Provident Trust Company of Philadelphia and Charles Sinkler, administrators estate of James K. Young, supra, it was held that "The common-law doctrine of estates by the entirety obtains in Pennsylvania, and as, under the common law, there was no transfer of such estate to the surviving spouse upon the death of the decedent, the value of such estate may not be included in the gross estate of the decedent."

The conclusion of the court is that the property in question was vested in the decedent and his wife as tenants by entireties; that there was no transfer of any interest or estate to the wife upon the death of the decedent, and consequently there was nothing to which a Federal estate tax could apply.

If it be held that the revenue act cited is intended to apply to estates by entireties in Pennsylvania, the court would be compelled

to hold that the result of the reference act as applies to the taxation of estates by collectors in Pennsylvania is in violation of section 2, [illegible] clause 2, and section 9, clause 4, of Article I of the Federal Constitution and the 5th amendment to the Constitution.

Tyler vs. United States of America, supra. It, therefore, follows that the tax in question was illegally collected and must be returned to the plaintiff, with interest.

And now, February 2, 1929, it is ordered that the plaintiff, the Dixie Trust & Safe Deposit Company, have judgment against the defendant, David W. Phillips, collector of internal revenue, 12th district, for the sum of $18,915.12 with interest at six per centum per annum, from September 10th, 1926.

By the court.

ALBERT W. JOHNSON,
District Judge.

In United States District Court

Order settling bill of exceptions

And now in furtherance of justice and that right may be done, and inasmuch as the matters and things above set forth do not appear of record in said cause and to the end that the same may be preserved in the record and presented to the honorable United States Circuit Court of Appeals for the Third Circuit, the defendants tenders and presents the foregoing as his bill of exceptions in this case and prays that the same may be allowed, settled, signed, sealed, made a part of the record, and ordered filed, which is accordingly done this 20th day of May, A. D. 1929, after presentation to opposing counsel for inspection and within the period which an appeal may lie from the judgment of the court in this cause, entered on March first, A. D. 1929.

ALBERT W. JOHNSON,
Judge of the District Court of the United States for the Middle District of Pennsylvania.

47 In United States District Court

Praecipe for judgment

Enter judgment in accordance with the opinion of Judge Johnson, filed February 2, 1929, in the above-stated case for the sum of Twenty-One Thousand Seven Hundred Fourteen Dollars and fifty-five cents ($21,714.55), as follows:

The amount of internal revenue paid	$18,915.12
Interest from Sept. 10, 1926, to February 28, 1929 (2 yrs., 5 mo., 18 days)	2,799.43
Total	21,714.55

CHARLES C. LARK,
Attorney for Plaintiff.

To A. O. Vorse, clerk, February 28, 1929.

In United States District Court

Judgment

March 1, 1929, judgment entered in favor of the [illegible] Trust & Safe Deposit Company, and against the defendant, David W. Phillips, collector of internal revenue, for the [illegible] the sum of $18,915.12, with interest from Sept. 10, 1926, in the sum of $2,799.43, making a total of $21,714.55.

A. O. Voss, *Clerk.*

48 In United States District Court

Certificate of probable cause

And now on this 20th day of May, A. D. 1929, the court, having been fully advised in the premises, hereby certifies that inasmuch as it appears of record in this case that the collector of internal revenue was acting pursuant to instructions from the Commissioner of Internal Revenue, there was probable cause for the collection of Federal taxes and interest thereon from the plaintiff, as shown by the record in this cause.

Albert W. Johnson,
District Judge for the Middle District of Pennsylvania.

In United States District Court

Assignments of error

Now comes the defendant, above named, David W. Phillips, collector of internal revenue for the twelfth collection district, and asks that the order and judgment entered in the above case be held to be erroneous for the following reasons:

First. The learned court erred in holding as follows:

"The conclusion of the court is that the property in question was vested in the decedent, and his wife as tenants by entireties; that there was no transfer of any interest or estate to the wife upon the death of the decedent and consequently there was nothing to which a Federal estate tax could apply."

Second. The learned court erred as follows:

"It, therefore, follows that the tax in question was illegally collected and must be returned to the plaintiff, with interest."

Third. The learned court erred as follows:

49 "Since under the law of Pennsylvania an estate by entireties is a unit and indivisible and upon the death of one of the tenants the interest or estate of the deceased tenant ceases and there is no transfer of any estate, or any part thereof, to the survivor, the survivor has the entire estate and takes no new estate. The value

of such estate may not be included in the gross estate of the decedent and hence there is nothing upon which to impose an estate tax under the revenue act of 1924."

Fourth. The learned court erred in entering the following order, to wit:

"And now, February 2, 1929, it is ordered that the plaintiff, the Dime Trust & Safe Deposit Company, have judgment against the defendant, David W. Phillips, collector of internal revenue, 12th district, for the sum of $18,914.13 with interest at six per centum per annum, from September 10th 1926.

By the court,

ALBERT W. JOHNSON,
District Judge."

Fifth. The entry of judgment in favor of the plaintiff and against the defendant in the sum of twenty-one thousand seven hundred fourteen dollars and fifty-five cents ($21,714.55) was erroneous.

ANDREW B. DUNSMORE,
A. A. VOSBURG,
Attorneys for Appellant.

50 In United States District Court

Petition for appeal

To the Honorable ALBERT W. JOHNSON, *District Judge:*

The petition of David W. Phillips, defendant, respectfully represents:

First. He is the collector of internal revenue for the twelfth district of Pennsylvania and this suit was brought against him to recover the sum of eighteen thousand nine hundred and fifteen dollars and twelve cents ($18,915.12), which was paid under protest on September 10th, 1926, together with interest thereon.

Second. That defense was made by your petitioner and the case fully heard before this honorable court.

Third. That on February 2, 1929, this court filed an opinion holding in favor of the plaintiff and against the defendant and directing that judgment be entered accordingly.

Fourth. That by praecipe filed judgment was entered in favor of the plaintiff and against the defendant on March 1st, 1929, in the sum of twenty-one thousand seven hundred fourteen dollars and fifty-five cents ($21,714.55).

Fifth. Your petitioner conceiving himself aggrieved by the order of court, and the judgment entered thereon, does hereby appeal from the said order and judgment to the United States Circuit Court of Appeals for the Third Circuit for the reasons specified in the assign-

ments of arrest, which are duly authenticated, may be sent
51 after be filed, and prays that the said appeal may be allowed
and that the proceedings and papers upon which said judg-
ment, order and judgment were made, duly authenticated, may be sent to
the United States Circuit Court of Appeals for the Third Circuit.

And your petitioner will ever pray.

ANDREW B. DUNMORE,
A. A. VOSBURG,
Attorneys for Appellant.

[*Duly sworn to by David W. Phillips; jurat omitted in printing.*]

52 [Citation in usual form showing service on John L. Sheaf omitted in printing.]

53 In United States District Court

Order allowing appeal

And now, May 14th, 1929, appeal allowed as prayed for.

By the court,

ALBERT W. JOHNSON,
District Judge.

In United States District Court

Stipulation for printing the record

It is hereby stipulated and agreed by and between Charles C. Lark, attorney for the plaintiff, and Andrew B. Dunmore, United States attorney for the middle district of Pennsylvania, and A. A. Vosburg, assistant United States attorney for the middle district of Pennsylvania, attorneys for the defendant, that the following be printed, and constitute the record on appeal in the above case before the United States Circuit Court of Appeals for the Third Circuit:

1. Docket entries.
2. Summons.
3. Statement of claim, including exhibits thereto attached.
54 4. Amended statement of claim.
5. Affidavit of defense.
6. Stipulation waiving jury trial.
7. Bill of exceptions.
8. Praecipe for judgment.
9. Judgment.
10. Certificate of probable cause.
11. Assignment of errors.

13. Petition for appeal and order allowing appeal.
14. This stipulation.
15. Certificate of the clerk of the district court.

ATTORNEY FOR PLAINTIFF.
ARTHUR B. DUNSMORE,
United States Attorney for the Middle District of Pennsylvania.
A. A. VOSBURG,
Assistant United States Attorney for the Middle District of Pennsylvania,
Attorneys for the Defendant.

55 [Clerk's certificate to foregoing transcript omitted in printing.]

56 [Minute entry of argument and submission, Dec. 4, 1930, omitted in printing.]

57 In United States Circuit Court of Appeals for the Third Circuit

OCTOBER TERM, 1930

No. 4142 (Last No. 93).

D. W. PHILLIPS, COLLECTOR, APPELLANT

vs.

DIME TRUST & SAFE DEPOSIT CO., EXECUTOR, W. B. LEWIS, DEC'D., appellee

Order assigning judge filed Dec. 4, 1930

On appeal from the District Court of the United States for the Middle District of Pennsylvania.

And now, to wit, this 4th day of December, A. D. 1930, it is ordered that Hon. J. Whitaker Thompson, district judge for the eastern district of Pennsylvania, and Hon. ———, district judge, for the ——— district of ———, be, and he is hereby, assigned to sit in above case hereafter to make a full court.

JOSEPH BUFFINGTON, *Circuit Judge.*

[File endorsement omitted.]

In United States Circuit Court of Appeals
Third Circuit

No. 4148, October Term, 1935

DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, Fourth District, defendant-appellant

vs.

DIME TRUST & SAFE DEPOSIT COMPANY, Executors of the Last Will and Testament of William B. Lewis, late of [illegible], Northumberland County, Pennsylvania, deceased, plaintiff-appellee

On Appeal from the District Court of the United States for the Middle District of Pennsylvania

Before BUFFINGTON, WOOLLEY, and THOMPSON, Circuit Judges.

Certificate to the Supreme Court filed Feb. [illegible], 1936

In order that it may properly decide this case the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court. Therefore, under authority of section [illegible] Judicial Code, it certifies three questions of law which arise from the following facts:

STATEMENT OF FACTS

William B. Lewis had been a citizen of the State of Pennsylvania. On his death in 1935 he and his wife, Anna Dunlap Lewis, were seized and possessed of thirteen pieces or parcels of real and personal property which on sundry dates they had acquired as tenants by the entirety. The executor of the will of William B. Lewis, duly presenting, included these properties in the [illegible] return filed under the revenue act of 1924, and still [illegible], paid the taxes levied and assessed on their full valuations. The executor has now brought this suit in a district court to recover the amounts of taxes so computed and paid, on the claim that it had been unlawfully exacted and collected because violative of the Pennsylvania [illegible] respect to intestacies by the statutory law, on which the [illegible] adjustment. That was before the decision in Tyler vs. United [illegible] 281 U. S. [illegible].

The thirteen properties [illegible] fall into three [illegible] class. The [illegible]

[illegible] account No. 2000 in the Dime Trust & Safe Depo[illegible] and in that name acquired, in 1910 and contin[illegible] of the husband.

The questions of law growing out of the foregoing facts up[illegible] which the Circuit Court of Appeals desires the instruction of t[illegible] Supreme Court are these:

QUESTIONS CERTIFIED.

1. Does section 302 of the revenue act of 1924 require that [illegible] value of property held by husband and wife as tenants by the [illegible] estate[illegible] prior to the effective date of the revenue act of 19[illegible] be included in the gross estate of the tenant first dying for the pu[illegible] of the Federal estate tax?

2. Does section 302 of the revenue act of 1924 require that [illegible] value of property held by husband and wife as tenants by the [illegible] tirety, acquired prior to the effective date of that act but after t[illegible] effective date of the revenue act of 1916, be included in the gro[illegible] estate of the tenant first dying for the purpose of the Federal est[illegible] tax?

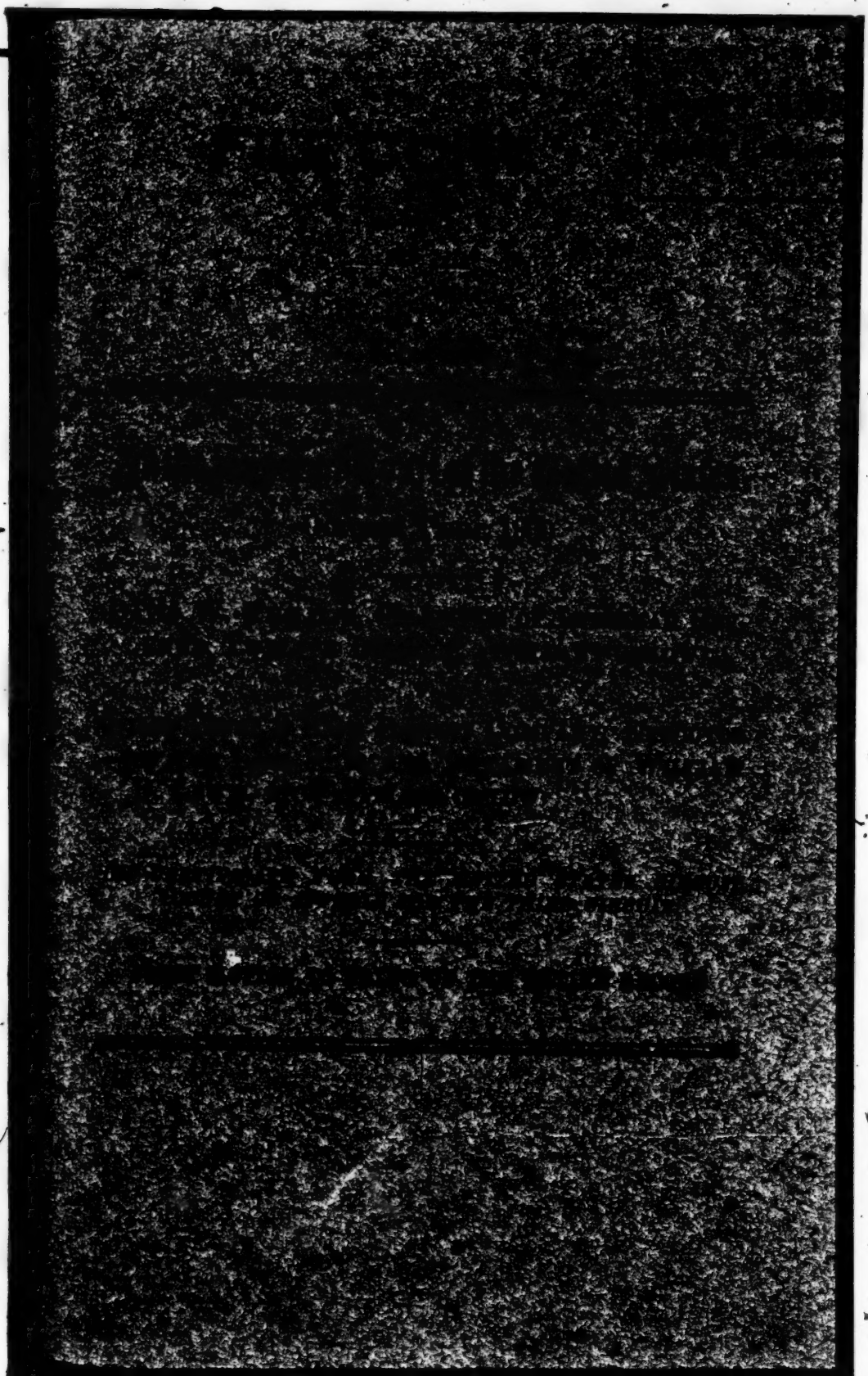
3. If the answer to either question be in the affirmative, had t[illegible] Congress power to extend the cited taxing provision to such [illegible] as acquired?

JOSEPH BUFFINGTON,
VICTOR B. WOOLLEY,
J. WHITAKER THOMPSON,
Circuit Judges.

[illegible] additional omitted.)

[illegible] additions to foregoing transcript omitted [illegible] printing.]

JAMES P. KINNEY,
Deputy Clerk of the United States Circuit Court of Appeals, Third Circuit.



In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 721

DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, Twelfth District, appellant (below)

v.

DIME TRUST & SAFE DEPOSIT COMPANY, EXECUTOR of the Last Will and Testament of William B. Lewis, etc., appellee (below)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT MOTION TO BRING UP THE ENTIRE RECORD

Now come David W. Phillips, Collector of Internal Revenue, Twelfth District, and Dime Trust & Safe Deposit Company, Executor of the last will and testament of William B. Lewis, appellee in this cause in the United States Circuit Court of Appeals for the Third Circuit, now pending in this Court on questions certified by the said Circuit Court of Appeals, and move that this Honorable Court issue its writ of certiorari commanding that court to certify and send to this Court the entire record in this

cause, in order that this Court may consider and decide the whole matter in controversy as upon appeal pursuant to Section 239 of the Judicial Code as amended by the Act of February 13, 1925, and Rule 37 of the Rules of this Court.

A certified transcript of the record in this case and nine printed copies thereof have been lodged with the Clerk of this Court as exhibits to this motion.

This was an action commenced in the United States District Court for the Middle District of Pennsylvania by Dime Trust & Safe Deposit Company, executor of the last will and testament of William B. Lewis, against David W. Phillips, Collector of Internal Revenue, Twelfth District, to recover certain sums paid on account of the federal estate tax assessed against said executor and paid by it under protest. From judgment in favor of the plaintiff the Collector duly appealed to the United States Circuit Court of Appeals for the Ninth Circuit, which court by certificate filed February 11, 1931, has certified to this Court the following questions:

> 1. Does section 302 of the revenue act of 1924 require that the value of property held by husband and wife as tenants by the entirety, acquired prior to the effective date of the revenue act of 1916, be included in the gross estate of the tenant first dying for the purpose of the Federal estate tax?

2. Does section 302 of the revenue act of 1924 require that the value of property held by husband and wife as tenants by the entirety, acquired prior to the effective date of that Act but after the effective date of the revenue act of 1916, be included in the gross estate of the tenant first dying for the purpose of the Federal estate tax?

3. If the answer to either question be in the affirmative, had the Congress power to extend the cited taxing provision to such an estate so acquired?

It is thought that the entire record will offer to the Court assistance in its decision which is not available in the certificate alone, for the reason that the certificate does not show the exact findings in regard to the various items of property held by the decedent and his wife as tenants by the entirety. The Court may desire to know the exact situation disclosed by the record in regard to these matters, and counsel feel that they will be able to present the case more satisfactorily upon the record than upon the certificate. The questions which the case involves are of importance to the Government and to numerous taxpayers, and the possibility of further litigation in regard to the exact points which arise should be avoided by final determination in this Court of the whole controversy.

The case was tried before the District Court upon written waiver of jury trial, and the court found the facts to be those which had been stipulated by the parties. The stipulation, together

with parts of the plaintiff's statement of claim in the District Court which are incorporated therein by reference, occupies about seven printed pages of the record. The rest of the record consists of the pleadings, the opinion of the court, the judgment, and the papers used in connection with the appeal. If the records sent up, the Court will not be compelled to examine any testimony, but will be in a position to interpret and answer the questions in view of the exact state of the record rather than upon the rather meager statement of facts made by the court in its certificate.

Wherefore, the parties hereto jointly pray that this Honorable Court issue its writ of certiorari commanding the United States Circuit Court of Appeals for the Third Circuit to certify and send to this Court the entire record in this case in order that this Court may consider and decide the whole matter in controversy as upon appeal.

David W. Pinkett,
Collector of Internal Revenue,
Twelfth District.

By Thomas D. Thacher, *Solicitor General.*

Dyer Tower & Safe Deposit Company,
Executors of the last will and testament
of William B. Leeds, etc.,

By Cravath & Hand, *Attorneys.*

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	3
Specification of errors	9
Summary of argument	9
Argument	12
I. The value of the property acquired after the passage of the Revenue Act of 1924 was properly included in the gross estate	12
II. The value of the property acquired prior to the passage of the Revenue Act of 1924 but after the passage of the Revenue Act of 1916 was properly included in the gross estate	15
III. The entire amount of the balances in the bank accounts at the time of the decedent's death was properly included in the gross estate	17
Conclusion	25
Appendix (statutes and regulations)	26

CITATIONS

Cases:

Chase National Bank v. *United States*, 278 U. S. 327	23
Commerce Union Trust Co. v. *Commissioner*, 21 B. T. A. 174	24
Coolidge v. *Long*, Nos. 33 and 34, October Term, 1930	19
Garrison v. *Commissioner*, 21 B. T. A. 904	24
Klein v. *United States*, No. 387, October Term, 1930	16, 23
Lucas v. *Girard Trust Company*, 281 U. S. 497	13
Lyon, Matter of, 233 N. Y. 208	25
Mercantile-Commerce National Bank v. *Commissioner*, 21 B. T. A. 1347	24
Milliken v. *United States*, No. 87, Oct. Term, 1930	11, 15
Nichols v. *Coolidge*, 274 U. S. 531	18, 22
Niles Bement Pond Co. v. *United States*, 281 U. S. 357	14
Pennsylvania Co. v. *Commissioner*, 21 B. T. A. 170	25
Provident Trust Co. v. *United States*, 281 U. S. 497	14
Putnam v. *Commissioner*, 21 B. T. A. 205	24
Reinecke v. *Northern Trust Co.*, 278 U. S. 339	22

Cases—Continued. Page
Reinecke v. Spalding, 280 U. S. 227 14
Robinson v. Commissioner, 21 B. T. A. 1373 24
Sidensticker v. Sidensticker, 276 U. S. 260 23
Slocum v. Commissioner, 21 B. T. A. 169 24
Third National Bank & Trust Co. v. White, 45 F. (2d) 911 24
Tyler v. United States, 281 U. S. 497 ..... 7, 9, 10, 12, 19–22
Untermeyer v. Anderson, 276 U. S. 440 19
Statutes:
Revenue Act of 1916, c. 463, Sec. 202 (c), 39 Stat. 756, 777–778, Title II (Estate Tax) 26
Revenue Act of 1917, c. 159, Sec. 900, 39 Stat. 1000, 1002 26
Revenue Act of 1917, c. 63, Sec. 900, 40 Stat. 300, 324 26
Revenue Act of 1918, c. 18, Sec. 402 (d), 40 Stat. 1057, 1097, Title IV (Estate Tax) 26
Revenue Act of 1921, c. 136, Sec. 402 (d), 42 Stat. 227, 278, Title IV (Estate Tax) 27
Revenue Act of 1924, c. 234, Sec. 302, 43 Stat. 253, 304, Title III (Estate Tax) 12–13, 15, 28–29
Revenue Act of 1926, c. 27, Sec. 302 (c), 44 Stat. 9, 70–71 (U. S. C. App., Title 26, Sec. 1094), Title III (Estate Tax) 29
Revenue Act of 1928, c. 852, 45 Stat. 791 29
Miscellaneous:
House Report No. 844, 68th Cong., 1st sess., p. 25 30
Senate Report No. 398, 68th Cong., 1st sess., p. 35 29
Treasury Decision 4248 33
Treasury Decision 4294 34
Treasury Regulations 68, promulgated under the Revenue Act of 1924—
Art. 22 30–31
Art. 23 31–33

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 721

DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, Twelfth District

v.

DIME TRUST & SAFE DEPOSIT COMPANY, EXECUTOR of the Last Will and Testament of William B. Lewis, Etc.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE COLLECTOR

OPINIONS BELOW

The case has not been decided by the Circuit Court of Appeals. The opinion of the District Court (R. 17) is reported in 39 F. (2d) 395.

JURISDICTION

The certificate of the Circuit Court of Appeals was filed in this Court on February 9, 1931. (R. 29.) On April 11, 1931, the parties filed a joint

motion for a writ of certiorari to bring up the entire record and cause. This motion was granted on April 20, 1931.

Jurisdiction is conferred by Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Instead of copying the questions certified, we present them (as we conceive they are raised upon the whole record) as follows:

Whether, in computing the Federal estate tax of a decedent who died in 1925 (which tax was consequently governed by Section 302 of the Revenue Act of 1924), the Commissioner was justified in including in the gross estate the entire value of certain items of property held by the decedent and his wife as tenants by the entirety at the time of his death, in the absence of any showing that any part of the property originally belonged to the survivor. The items included—

(1) Some property which was acquired by the husband and wife after the passage of the Revenue Act of 1924;

(2) Some property which was acquired by them before the passage of that Act but after the passage of the Revenue Act of 1916 (which was the first Act to impose a Federal estate tax); and

(3) A savings account and a checking account, in regard to which the findings show merely the amounts on deposit at the time of the death of the

decedent and the fact that the accounts were opened in 1910.

STATUTES INVOLVED

The statute involved is Section 302 of the Revenue Act of 1924, pp. 28–29, *infra*. The appendix (pp. 26–34, *infra*) prints or refers to similar provisions in all of the other Revenue Acts and also a Congressional Committee Report and regulations.

STATEMENT

There is no dispute as to the facts in this case, a jury trial having been waived in writing and the trial court having found the facts to be as stipulated by the parties. (R. 13, 18.)

The action was brought in the District Court of the United States for the Middle District of Pennsylvania by the Executor of the will of William B. Lewis, deceased, who died in 1925, domiciled in Pennsylvania, against the local Collector of Internal Revenue of the United States to recover $18,915.12 (with interest thereon from September 16, 1926), which the plaintiff asserts was the amount collected in excess of the correct amount of the Federal estate tax against the estate. (R. 2.) The only controversy is in connection with thirteen items of property, all of which the executor asserted were held by the decedent and his wife as tenants by the entirety at the time of his death. (R. 8.) The District Court held that all of these items were held in tenancies by the entirety

(R. 23) and the Government does not challenge this holding. These items include interests in real estate in Pennsylvania and in Florida, shares of the capital stock of a New Jersey corporation, mortgage bonds of a corporation located in Shamokin, Pennsylvania (as to which the State of incorporation does not appear), bonds and notes secured by mortgages of real estate (some of which was in Pennsylvania and some of which was in Florida), unsecured promissory notes, household furniture, and a savings account and a checking account in a bank in Pennsylvania. These items of property are described in detail in Paragraph Ninth of the statement of the plaintiff's claim filed in the District Court, which paragraph was incorporated by reference in the stipulation of facts (R. 3–7, 18.) For present purposes the items may be identified and grouped as follows (the numbers given being the numbers of the subparagraphs in Paragraph Ninth of the plaintiff's statement of claim in the District Court):

Group A.—Property held in joint tenancies created after the passage of the Revenue Act of June 2, 1924

(5) Bonds of a water company located in Shamokin, Pennsylvania, acquired September 6, 1924. The stipulation recites: "They were purchased out of funds of William B. Lewis or Anna Laura Lewis on deposit in Dime Trust & Safe Deposit Com-

pany." (R. 19.) No statement is made as to when the funds were deposited. It seems probable, however, that they came from one of the accounts which was opened in 1910.

(6) A bond secured by mortgage of real estate in Pennsylvania, transferred to the decedent and his wife on May 1, 1925.

(10) Unsecured promissory note, dated May 4, 1925. It appears that the note was given for a loan made from funds accumulated in the savings bank which were accumulated prior to June 2, 1924. (R. 19.)

Group B.—Property held in tenancies by the entirety created between the date of passage of the Revenue Act of September 8, 1916, and the date of passage of the Revenue Act of June 2, 1924

(1) A tract of land in Pennsylvania, deeded to the decedent and wife on August 12, 1922.

(2) A tract of land in Pennsylvania, deeded to the decedent and wife on November 5, 1919.

(3) A tract of land in Florida, deeded to the decedent and wife on December 26, 1923.

(4) Four thousand shares of the capital stock in a New Jersey corporation, the original certificates for which were issued to the decedent and wife on September 10, 1921.

(7) Note, secured by mortgage of real estate in Pennsylvania, dated February 16, 1923.

(8) Note, secured by mortgage of real estate in Florida, dated January 11, 1924.

(9) Note, secured by mortgage of real estate in Florida, dated April 25, 1924.

(18) Household furniture, valued at $2,075. All that appears in regard to this is that it "was purchased with funds of William B. Lewis and Anna Laura Lewis, about 1920, from the savings account in Dime Trust & Safe Deposit Company." (R. 19.)

Group C.—Bank accounts which were opened in 1910

(11) All that appears in regard to this item is the following:

> Saving Account No. 3322 in Dime Trust & Safe Deposit Company standing in the name of William B. Lewis or Anna L. Lewis. On September 25, 1925, the date of William B. Lewis's death, there was a balance of forty-seven thousand nine hundred sixty-two dollars and eighty cents ($47,962.80) and the accrued interest thereon was eight hundred twelve dollars and thirty-three cents ($812.33). (R. 6–7.)
>
> * * * * *
>
> Item No. 11, consisting of saving account No. 3322 in Dime Trust & Safe Deposit Company, standing in the name of William B. Lewis or Anna L. Lewis, at the time of Mr. Lewis's death, showed a balance of $47,962.80, and the accrued interest thereon was $812.33. This savings account was opened in 1910 in the names of William B. Lewis or Anna Laura Lewis. (R. 19.)

(12) This is a checking account in the same bank. All that appears is that the account was opened in 1910 and that the balance at the time of the decedent's death was $1,566.66. (R. 7, 19.)

It does not appear what amount was put in either of these accounts when it was opened or what withdrawals from it or deposits to it there had been since that time.

The only other findings which can possibly be material in regard to the issues presented here are that at all times in question the decedent was married to Anna Laura Lewis, who survived him, and that the title to each item of property mentioned, excepting the furniture, "stood in the names of William B. Lewis and Anna Laura Lewis from the date of the inception of the title of the various items of property until the date of his death." (R. 19.)

The entire value of the property held in tenancies by the entirety was evidently included in the gross estate. (See Paragraph V of Affidavit of Defense, R. 13.)

The District Court decided the case in 1929, before the decision of this Court in *Tyler* v. *United States*, 281 U. S. 497.

The holdings of the District Court appear in the following extracts from the opinion (R. 23-24):

> Since under the law of Pennsylvania an estate by entireties is a unit and indivisible and upon the death of one of the tenants the interest or estate of the deceased tenant

cease and there is no transfer of any estate, or any part thereof, to the survivor, the survivor has the entire estate and takes no new estate. The value of such estate may not be included in the gross estate of the decedent and hence there is nothing upon which to impose an estate tax under the revenue act of 1924.

* * * * *

The conclusion of the court is that the property in question was vested in the decedent and his wife as tenants by entireties; that there was no transfer of any interest or estate to the wife upon the death of the decedent, and consequently there was nothing to which a Federal estate tax could apply.

* * * It, therefore, follows that the tax in question was illegally collected and must be returned to the plaintiff, with interest.

And now, February 2, 1929, it is ordered that the plaintiff, the Dime Trust & Safe Deposit Company, have judgment against the defendant, David W. Phillips, collector of internal revenue, 12th district, for the sum of $18,915.12 with interest at six per centum per annum, from September 10th, 1926.

The Government assigned the holdings quoted as error. (R. 25–26.)

The court also said (R. 23–24):

If it be held that the revenue act cited is intended to apply to estates by entireties in Pennsylvania, the court would be compelled

to hold that so much of the revenue act as applies to the taxation of estate by entireties in Pennsylvania is in violation of section 2, clause 3, and section 9, clause 5, of Article I of the Federal Constitution and the 5th amendment to the Constitution. *Tyler* v. *United States of America, supra.*

Judgment was entered for the plaintiff for the full amount claimed (R. 25) and the Government appealed. Before deciding the appeal the Circuit Court of Appeals certified certain questions to this Court. (R. 29-30.)

SPECIFICATION OF ERRORS

The Government specifies as errors all of the holdings of the District Court which appear in the language from the opinion of that court quoted on pages 7 to 9 above. In other words, the Government assigns as errors the holdings of the District Court that the value of each of the thirteen items of property listed above should not have been included in the gross estate of the decedent for purposes of computing Federal estate taxes on his estate.

SUMMARY OF ARGUMENT

The Government contends that the Commissioner, in computing the Federal estate tax, properly included in the gross estate of the decedent all of the items in question, and that the questions as relating to all of the items is governed by the reasoning, although not by the actual decisions, in

Tyler v. *United States*, 281 U. S. 497, and the cases decided with it.

Inasmuch as the certificate of the Circuit Court of Appeals indicates that the court believed that the items fell into three different periods as to which different rules might apply, we discuss those three different periods separately.

The question as to the property which was acquired after the passage of the Revenue Act of 1924 (which was applicable, as the decedent died in September, 1925) is the same as that which was decided in the *Tyler case*. The only possible difference between that case and this part of the instant case is that in the *Tyler case* it affirmatively appeared that the property in question belonged to the decedent as the sole owner up to the time when the tenancy by the entirety was created. Here the Government relies upon the absence of any proof that any part of the items in question originated in property belonging to the wife and the provision of the statute that the value of the property shall be taxed "except such part thereof as may be shown to have originally belonged to such other person." The regulation promulgated under this provision, to the effect that "the entire value of such property is *prima facie* a part of the decedent's gross estate," is obviously a proper interpretation of the statute. On the record in the instant case the determination of the Commissioner can not be disputed.

The value of the property acquired before the passage of the Revenue Act of 1924, but after the passage of the Revenue Act of 1916, was properly included in the gross estate. Section 302 (h) of the Revenue Act of 1924 provides that the subdivision in regard to property held by tenants by the entirety shall apply to such estates whether created "before or after the enactment of this Act." Any question as to the constitutionality of this provision as applied to property acquired after the passage of the Revenue Act of 1916 is set at rest by the decision of this Court in *Milliken* v. *United States*, No. 87, October Term, 1930, which was rendered after the Circuit Court of Appeals certified the questions in the instant case.

The entire amount of the balances in the bank accounts at the time of the decedent's death was properly included in the gross estate. The mere fact that these accounts were created in 1910 does not justify the assumption that the balances existing at the time of the decedent's death represented money deposited in the accounts prior to 1916, as there is no finding as to the amount of the balances at the date of the passage of the Act of 1916 and the record contains no information as to withdrawals or deposits either before or since that date. But even if these balances could be treated as representing deposits made prior to 1916, they should be included in the gross estate. The provision of the Act of 1924 quoted above obviously is intended to include jointly held property, even if acquired

prior to the passage of the Act of 1916. The reasoning of this Court in the *Tyler case* shows that such a provision is not open to the objection that it violates the constitutional provisions as to direct taxes or as to due process of law.

ARGUMENT

The Government contends that the Commissioner properly included in the gross estate all of the items of property in question, and that it is immaterial when any tenancy by the entirety was created. But as the certified questions show that the Circuit Court of Appeals felt that certain distinctions might be made, we discuss separately the three different periods indicated by the certificate.

I

THE VALUE OF THE PROPERTY ACQUIRED AFTER THE PASSAGE OF THE REVENUE ACT OF 1924 WAS PROPERLY INCLUDED IN THE GROSS ESTATE

Under this heading come the items which we have put in Group A in our statement (pp. 4–5, *supra*).

The question as to these items is obviously answered by *Tyler* v. *United States*, 281 U. S. 497, and the two other cases decided in the same opinion. Those other cases involved tenancies by the entirety in Pennsylvania real estate. The only possible distinction between the situation presented in those cases and that presented in regard to these items is that in those cases it affirmatively appeared that the property taxed belonged to the decedent as the sole

owner up to the time when the tenancy by the entirety was created. In one of them, the *Girard Trust Company case*, it did not appear positively that the surviving spouse furnished no part of the consideration for the purchase of the property, although, perhaps, this was a fair inference from the facts recited in the finding. Even if there is a difference in the precise situation covered by the cases, we submit that it is immaterial. Section 302 of the Revenue Act of 1924 (p. 28, *infra*) provides that the—

> value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth [with certain provisos].

The regulations promulgated under this section in regard to property held by tenants by the entirety provide: "The entire value of such property is

prima facie a part of the decedent's gross estate." (Art. 23, Regulations 68, pp. 31-33, *infra*.) This is obviously a proper interpretation of the statute. As the record in the instant case does not show that any part of the items in question originated in property belonging to the wife of the decedent, the determination of the Commissioner can not be reversed, as "the burden rests upon the taxpayer to prove all the facts necessary to establish the illegality of the collection." *Niles Bement Pond Co.* v. *United States*, 281 U. S. 357, 361; *Reinecke* v. *Spalding*, 280 U. S. 227, 232.

Perhaps special mention should be made of Item 10, a note dated May 4, 1925. Although this was acquired by the decedent and his wife after the passage of the Act of 1924, it represented a loan of funds which belonged to them as tenants by the entirety prior to the enactment of that Act. But the item can not be treated as if the tenancy by the entirety in the property was created before the passage of the Act because of that fact. In the *Provident Trust Company case*, which was decided with *Tyler* v. *United States*, it appeared that one of the items in question was acquired after the passage of the applicable Act with property which was held in a tenancy by the entirety prior to the passage of the Act. This fact was called to the attention of the Court in the Government's brief (No. 546, October Term, 1929), but this Court said (p. 500):

In each case the estate was created after the passage of the applicable Act.

II

THE VALUE OF THE PROPERTY ACQUIRED PRIOR TO THE PASSAGE OF THE REVENUE ACT OF 1924 BUT AFTER THE PASSAGE OF THE REVENUE ACT OF 1916 WAS PROPERLY INCLUDED IN THE GROSS ESTATE

Section 302 of the Revenue Act of 1924 provides in subdivision (e) for the inclusion of the interest in all property held as tenants by the entirety by the decedent and spouse. Subdivision (h) of this section provides:

> Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

The Act consequently is intended to apply to property held in tenancies by the entirety created prior to the passage of the Act.

The only possible question as to such property is whether the Act is unconstitutional. After the Circuit Court of Appeals certified questions in the instant case, this Court handed down its opinion in *Milliken* v. *United States*, No. 87, October Term, 1930. That case involved the provision in Section 402 of the Revenue Act of

1918 that property of which the decedent had made a transfer in contemplation of death should be included in the gross estate. The Court held that the provision was free from constitutional objections as applied to such a transfer made prior to the passage of the Act of 1918, but after the passage of the Act of 1916, which had contained similar provisions for the taxing of decedent's estates, including gifts in contemplation of death, but at lower rates, and which was repealed by the 1918 Act. Upon the reasoning in that case, it is clear that there can be no constitutional objection to the provision requiring the inclusion of property held by the decedent and his wife as tenants by the entirety as applied to property in which the tenancy was created after the passage of the Act of 1916, which provided that property held by the decedent and spouse as "tenants in the entirety" should be included in the gross estate in computing the Federal estate tax. (Section 202 (e), p. 26, *infra*.) Such a provision has been in effect at all times since the passage of the Act of 1916. See Section 402 (d) of the Revenue Acts of 1918 and 1921, pp. 26–27, *infra*.

See also *Klein* v. *United States*, No. 387, October Term, 1930, decided April 13, 1931.

There consequently can be no doubt as to the propriety of the action of the Commissioner in including the items which we have listed in Group B, pp. 5–6, *supra*.

III

THE ENTIRE AMOUNT OF THE BALANCES IN THE BANK ACCOUNTS AT THE TIME OF THE DECEDENT'S DEATH WAS PROPERLY INCLUDED IN THE GROSS ESTATE

There remain to be considered only two items, a checking account and a savings account in a bank. The District Court evidently concluded that tenancies by the entirety existed as to these accounts. Whether this is correct or not seems unimportant, in view of the fact that the applicable statute treats tenancies by the entirety and deposits in banks in "joint names and payable to either" in exactly the same manner. (Section 302 (e) of the Revenue Act of 1924, p. 28, *infra*.)

Apparently the Circuit Court of Appeals regarded the balances in these accounts as having been on deposit since some date prior to the passage of the Revenue Act of 1916, as there are no other items which can be effected by the first question certified (R. 30):

> Does section 302 of the revenue act of 1924 require that the value of property held by husband and wife as tenants by the entirety, acquired prior to the effective date of the revenue act of 1916, be included in the gross estate of the tenant first dying for the purpose of the Federal estate tax?

We contend that upon the state of the record, the Court is not justified in assuming that any part of the balances in question was held by the decedent and his wife as tenants by the entirety prior

to the passage of the Revenue Act of 1916. All that the findings show is that each of the accounts was opened in 1910 in their joint names. (R. 19.) There is no showing whatever as to the amount originally deposited or the balance on hand at the date of passage of the Revenue Act of 1916. There is not even a statement as to whether any deposits other than the original deposits were made or as to the amount of withdrawals, although it does appear that the household furniture was purchased in 1920 with funds from the savings account. (R. 19.) We submit that the plaintiff is in no position to make any contention whatever as to either of the bank accounts, as it is entirely possible that the entire balance on hand at the time of the decedent's death represented deposits made in the account subsequent to the passage of the Revenue Act of 1924 or subsequent to the passage of the Revenue Act of 1916.

Even if it could be assumed that a tenancy by the entirety in some of the property in question was created prior to the passage of the Act of 1916, we maintain that it was properly included in the gross estate. On this assumption the sole question is whether the clearly expressed intention of Congress violates the "due process" clause of the Fifth Amendment.

In *Nichols* v. *Coolidge*, 274 U. S. 531, this Court enunciated the rule that Congress may not consti-

tutionally enact an estate tax on property which was finally transferred before the enactment of the taxing statute. Similar principles were later applied in *Untermeyer* v. *Anderson*, 276 U. S. 440, and more recently in *Coolidge* v. *Long*, Nos. 33 and 34, decided February 24, 1931, in both of which this Court held that taxing statutes violated a "due process" clause of the Constitution.

But in the present case the event which is taxed is the "shifting of the economic benefits of property," which takes place on the decedent's death, after the enactment of the taxing statute. In *Tyler* v. *United States*, 281 U. S. 497, *supra*, this Court upheld the constitutionality of an estate tax laid on property held by the decedent as a tenant by the entirety. In that case the tenancy was created after the passage of the applicable taxing statute, so that the actual decision is not necessarily controlling here. But we submit that the grounds on which the decision in the *Tyler case* is based make it clear that the application of the taxing statute to a tenancy by the entirety created before September 8, 1916, is not a retroactive application and that it is valid under the Constitution.

In its opinion in the *Tyler case*, this Court stated that the death of a tenant by the entirety was the "generating source" resulting in "the bringing into being or the enlargement of property rights," and that if Congress chose to place a tax upon such

a result, there was nothing in the Constitution which prevented. This Court then said (p. 503):

> The question here, then, is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.
>
> * * * * *
>
> Taxation, as it many times has been said, is eminently practical, and a practical mind, considering results, would have some difficulty in accepting the conclusion that the death of one of the tenants in each of these cases did not have the effect of passing to the survivor substantial rights, in respect of the property, theretofore never enjoyed by such survivor. Before the death of the husband (to take the *Tyler case*, No. 428) the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased

> to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the "generating source" of important and definite accessions to the property rights of the other. These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax. And in that view the resulting tax attributable to such property is plainly indirect.

These extracts from the opinion in the *Tyler case* make it clear that death, the event which is the occasion for the imposition of the tax, is the generating source of the enlargement of property rights in the survivor. This is an event which takes place after the passage of the taxing statute, regardless of when the tenancy was created. In the present case, the decedent's death was the event which made the shifting of the full benefits of ownership to his wife complete and effective, and secured to her the sole possession and enjoyment of the property unburdened by her husband's rights. Until his death, the decedent re-

tained a dominion over the property equal in all respects to that of his wife, and, if she had predeceased him, he would have had the entire interest in the property. Under the decision in the *Tyler case*, this ripening of property rights is a proper subject for the imposition of a tax.

In *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, this Court upheld the inclusion in the gross estate of the value of property which the decedent had transferred on revocable trusts in 1903 and 1910, prior to the enactment of any estate tax law. In distinguishing the case of *Nichols* v. *Coolidge*, 274 U. S. 531, this Court said (p. 345):

> As to the two trusts, it is argued that since they were created long before the passage of any statute imposing an estate tax the taxing statute if applied to them is unconstitutional and void, because retroactive, within the ruling of *Nichols* v. *Coolidge*, 274 U. S. 531. In that case it was held that the provisions of the similar section 402 of the 1918 Act, 40 Stat. 1097, making its applicable to trusts created before the passage of the act was in conflict with the Fifth Amendment of the federal Constitution and void, as respects transfers completed before any such statute was enacted. But in *Chase National Bank* v. *United States*, decided this day, *ante*, p. 327, the decision is rested on the ground, earlier suggested with respect to the Fourteenth Amendment in *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271, that a transfer made subject to a power of

> revocation in the transferor, terminable at his death, is not complete until his death. Hence section 402, as applied to the present transfers, is not retroactive, since his death followed the passage of the statute.

A similar result was reached in *Saltonstall* v. *Saltonstall*, 276 U. S. 260, where this Court sustained the validity of a Massachusetts statute imposing a succession tax on property passing under a trust, executed before the passage of the taxing statute, where the settlor of the trust reserved a general power to change its terms or terminate it, with the concurrence of one trustee.

In *Chase National Bank* v. *United States*, 278 U. S. 327, this Court said (p. 338):

> Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax, *Chanler* v. *Kelsey*, 205 U. S. 466.

See also *Klein* v. *United States*, *supra*.

It would seem to follow from these decisions that the date of the creation of the tenancy is immaterial. The ripening and completion of the economic benefits to the survivor does not occur until the death of the decedent. Upon the happening of that event the tax is imposed, and no question of retroactivity is involved.

The Regulations of the Treasury Department have not been uniform as to the question now under consideration. At first the Department applied the statute to all tenancies whenever created. Regulations 68, issued under the Revenue Act of 1924, merely copied Section 302 (h) of that Act (p. 29, *infra*). In 1928, Treasury Decision 4248 was promulgated, providing that the taxing statute did not apply to tenancies created before September 8, 1916. (P. 33, *infra*.) But, on July 3, 1930, after the decision of this Court in the *Tyler case*, Treasury Decision 4294 was promulgated. (P. 34, *infra*.) This decision revoked the earlier ruling and expressly provided that all tenancies by the entirety were subject to the tax regardless of the time when they were created. This regulation is still in effect.

The precise question now under consideration has been before the District Court for the District of Massachusetts and the Board of Tax Appeals, and both decided that property held by a decedent as a tenant by the entirety was subject to the estate tax, although the tenancy was created before September 8, 1916. *Third National Bank & Trust Co.* v. *White*, 45 F. (2d) 911; *Slocum* v. *Commissioner*, 21 B. T. A. 169; *Commerce Union Trust Co.* v. *Commissioner*, 21 B. T. A. 174; *Putnam* v. *Commissioner*, 21 B. T. A. 205; *Garrison* v. *Commissioner*, 21 B. T. A. 904; *Mercantile-Commerce National Bank* v. *Commissioner*, 21 B. T. A. 1347; *Robinson* v. *Commissioner*, 21 B. T. A. 1373.

No decisions to the contrary have been rendered since the decision of this Court in the *Tyler case*.

An argument against the validity of the statute as applied to tenancies by the entirety created before the passage of the applicable act may be found in the dissenting opinion in *Pennsylvania Co.* v. *Commissioner*, 21 B. T. A. 176, 183.

The Court of Appeals of New York in 1922 held a similar provision in a state statute invalid as applied to property held in tenancies by the entirety created prior to the passage of the statute. *Matter of Lyon*, 233 N. Y. 206.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted.

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APRIL, 1931.

APPENDIX

STATUTES

The Revenue Act of 1916 (Act of September 8, 1916, c. 463, 39 Stat. 756, 777–778) in Title II (Estate Tax) provided in part:

> SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:
>
> * * * * * *
>
> (c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.
>
> * * * * * *

Section 300 of the Act of March 3, 1917, c. 159, 39 Stat. 1000, 1002, and Section 900 of the Revenue Act of 1917 (Act of October 3, 1917, c. 63, 40 Stat. 300, 324), increased the rates of the Estate Tax but made no other changes in this tax.

The Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1097) in Title IV (Estate Tax) contained the same provision except that it was renumbered to be Section 402 (d).

The Revenue Act of 1921 (Act of November 23, 1921, c. 136, 42 Stat. 227, 278) in Title IV (Estate Tax) provided in part:

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof;

* * * * * * *

The Revenue Act of 1924 (Act of June 2, 1924, c. 234, 43 Stat. 253, 304) in Title III (Estate Tax) provided in part:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional

part to be determined by dividing the value of the property by the number of joint tenants;

* * * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 1094.)

In the Revenue Act of 1926 (Act of February 26, 1926, c. 27, 44 Stat. 9, 70–71; U. S. C. App., Title 26, Sec. 1094) in Title III (Estate Tax) Section 302 (e) is the same as Section 302 (e) in the Revenue Act of 1924, set out above, except that in the two places in which it appears the phrase "a fair consideration" is replaced by the phrase "an adequate and full consideration"; and Section 302 (h) is the same in the two Acts, except that in the Revenue Act of 1926, the words "Except as otherwise specifically provided therein" are inserted at the beginning of the subsection.

No changes were made in this provision by the Revenue Act of 1928 (Act of May 29, 1928, c. 852, 45 Stat. 791).

CONGRESSIONAL COMMITTEE REPORT

Revenue Act of 1924

In the Report of the Committee on Finance, Senate Report No. 398, 68th Cong., 1st sess., it was said (p. 35):

> Section 302 (e): The provisions of the House bill and the existing law have been reworded to secure greater clarity.

Section 302 (h): This subdivision provides that the property interests which are included in the gross estate for purposes of the estate tax are those enumerated in this section, whether such interests were created or arose or were relinquished before or after the enactment of this act.

A similar provision is included in subdivision (e) [relating to trusts] of section 402 of the existing act [Revenue Act of 1921]. It has seemed desirable to extend this provision expressly to the other property interests set forth in this section.

In the Conference Report, House Report No. 844, 68th Cong., 1st Sess., it was said (p. 25):

The provision of the House bill with reference to that part of the gross estate made up of property held by the decedent as a joint tenant or as a tenant by the entirety has been reworded for purposes of clarity. * * *

REGULATIONS

Regulations 68, promulgated under the Revenue Act of 1924, provided in part:

ART. 22. *Property held jointly or as tenants by the entirety.*—The foregoing provisions of the statute extend to joint ownerships, wherein the right of survivorship exists, and specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed towards the acquisition of the property so held or deposited, or acquired it by

gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and all interest therein forms a part of the decedent's estate for purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common.

ART. 23. *Taxable portion.*—The entire value of such property is prima facie a part of the decedent's gross estate, but as it is not the intent of the statute that there should be so included a greater part or proportion thereof than is represented by an outlay of funds, which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner where neither had parted with any consideration in its acquirement, facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

Whether the value of the entire property, or only a part, or none of it, enters into the make-up of the gross estate, depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth, forms no part of the decedent's gross estate. (2) Where the facts are otherwise the same as in (1), but the decedent paid to such other joint owner a consideration for the interest by him (the decedent) acquired in the property, then such portion of the value of the property, proportionate to the consideration

so paid, constitutes a part of the gross estate. (3) Where the property, or a part thereof, or a part of the consideration wherewith it was acquired, had at any time been acquired by the other joint owner from the decedent as a gift, or for less than a fair consideration in money or money's worth, then such portion of the value of the entire property, proportionate to the consideration, if any, which in the first instance was paid from such other joint owner's own funds, forms no part of the gross estate. (4) Where the property was acquired by the decedent and his or her surviving spouse as tenants in the entirety by gift, will, or inheritance, then but one-half of the value of the property becomes a part of the gross estate. (5) Where acquired by the decedent and the other joint owner as joint tenants by gift, will, or inheritance, and their interests are not otherwise specified, or fixed by law, then one-half only of the value of the property is a part of the gross estate; or, where so acquired by the decedent and two or more persons, and the interests of the several joint tenants are not otherwise determinable, then the decedent and the other joint tenants surviving him shall each be deemed the owner of an equal fractional part, and the value of one only of such fractional parts is to be included in the gross estate.

The following are given as illustrative: (a) Where the decedent furnished the entire purchase price, the entire property should be included in the gross estate; (b) where the decedent furnished a part only of the purchase price, only a corresponding portion of the property should be so included; (c) where the decedent, prior to the acquisition of the property by himself and

the other joint owner, gave the latter a sum of money which later constituted such other joint owner's entire contribution to the purchase price of the property, the entire value of the property should be included; (d) where the other joint owner, prior to the acquirement of the property, received from the decedent, for less than a fair consideration in money or money's worth, property which thereafter became, as such, or in a converted form, part of the purchase price of the property, the value of the property to be included is to be reduced proportionately to the consideration furnished by the other joint owner in the original transaction; (e) where the decedent furnished no part of the purchase price, no part of the property should be included; (f) where the decedent and spouse acquired the property by will as tenants by the entirety, one-half of the value of the property should be included.

Treasury Decision 4248, promulgated November 23, 1928, provides:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 22 of Regulations 68 and 70 is hereby amended by adding thereto the following sentence:

The statute applies only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved November 23, 1928:
A. W. MELLON,
Secretary of the Treasury.

Treasury Decision 4294, promulgated July 3, 1930, provides:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

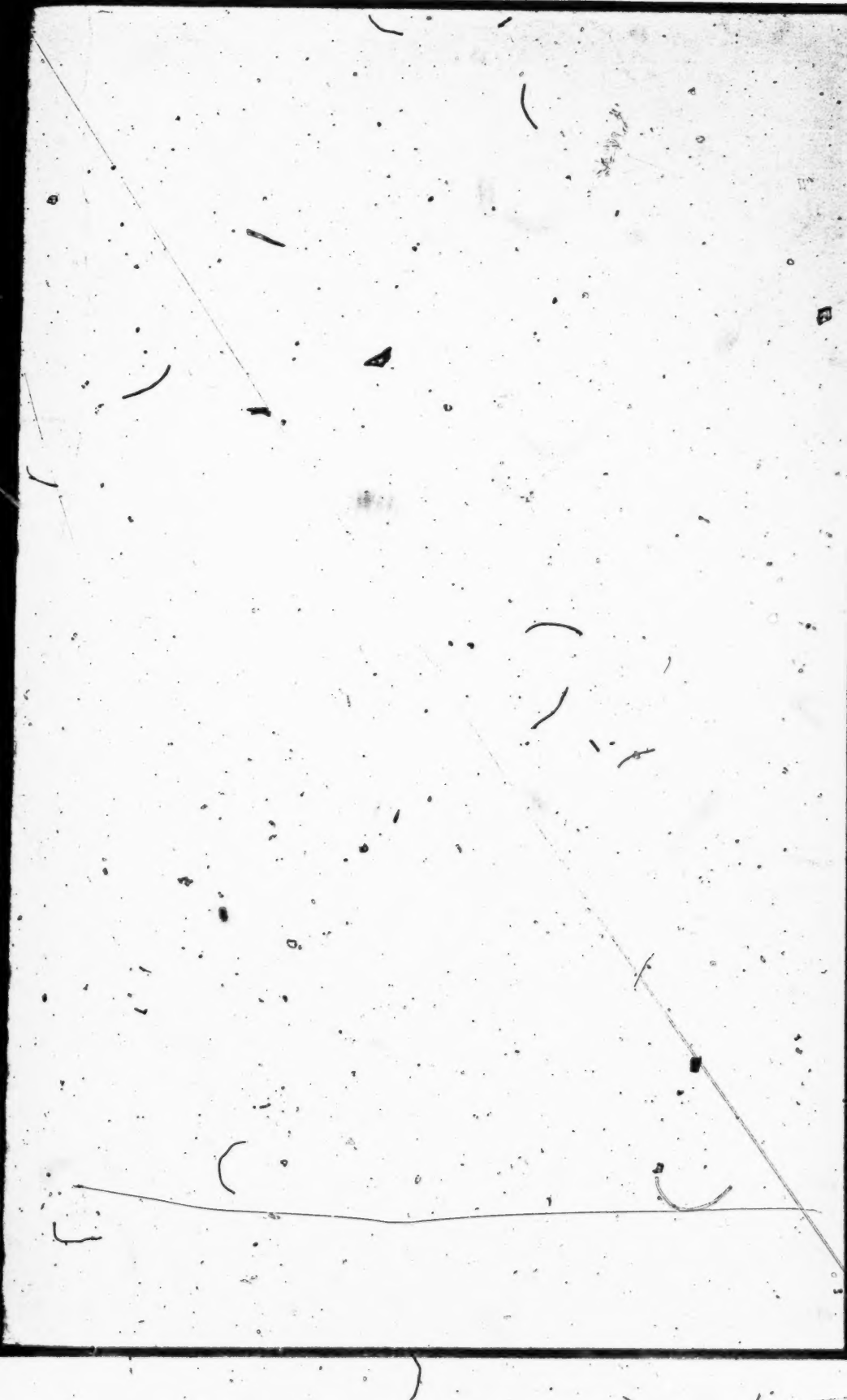
The last sentence of article 22 of Regulations 68, added thereto by T. D. 4248, is amended to read as follows:

"The statute extends to joint ownerships wherein the right of survivorship exists, regardless of when such joint ownerships were created."

ROBT. H. LUCAS,
Commissioner of Internal Revenue.

Approved July 3, 1930:
A. W. MELLON,
Secretary of the Treasury.

U. S. GOVERNMENT PRINTING OFFICE: 1931



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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930, No. 218

DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, Twelfth District,
Appellant (below),

v.

DIME TRUST & SAFE DEPOSIT COMPANY, EXECUTOR of the Last Will and Testament of William B. Lewis, etc.,
Appellee (below).

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

CHARLES C. LARK,
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Shamokin, Pa.,
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INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
CONCISE STATEMENT OF CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	7
1—Nature and Incidents of an Estate by Entirety	7
2—Property Acquired by the Entireties After the Passage of the Revenue Act of June 2, 1924	9
3—Property Acquired Prior to the Passage of the Revenue Act of 1924 But After the Passage of the Revenue Act of 1916	10
4—Property Acquired Prior to the Passage of the Act of 1916	28
APPENDIX	31

CITATIONS.

Cases:

	Page
Allen vs. Lyon, 216 Pa. 604 at 606	8
Beihl vs. Martin, 236 Pa. 519	7, 8
Blease vs. Anderson, 241 Pa. 198	7
Blick vs. Cochens, 252 Pa. 56	9
Blodgett vs. Holden, 275 U. S. 142, 72 L. ed. 206	13, 14
Blount vs. United States, 59 Ct. of Cl. 328	12, 29
Brayberry's Estate, 156 Pa. 628	7, 8
Carnegies Estate, In Re, 203 App. Div. 91; 196 N. Y. Supp. 502	27
Chase National Bank vs. United States, 278 U. S. 327, 73 L. ed. 405	24, 25, 28
Clarke vs. Clarke, 178 U. S. 186, 44 L. ed. 1028	9
Coolidge vs. Long, 282 U. S. —, 75 L. ed. 308	10, 17
Crump vs. Guyer, 2 A. L. R. 331	22
Dyer et al., executors of Est. of C. I. Hudson, 5 U. S. Bd. of Tax Appeals, R. 711	12
English vs. English, 63 Southern 822	9
Fleek vs. Zillhaver, 117 Pa. 213	8
French vs. Deen, 24 L. R. A. 387 at 391	19
Gasner vs. Pierce, 286 Pa. 529	7, 8
Glick vs. Cochens, 252 Pa. 56	8
Hamilton Bank vs. Dudley, 2 Peters 492	29
Hamilton vs. Rousk Bros., 19 L. R. A. 584 at 586	19
Heinz, Yellow Pine Trustees vs. Martin, 268 U. S. 458, 69 L. ed. 1050	9
Hetzel vs. Lincoln, 216 Pa. 60	8
Hilt vs. Hilt, 50 Pa. Sup. Ct. 455	7
Hoover vs. Potter, 42 Pa. Sup. Ct. 21	7
Hunt vs. Blackburn, 128 U. S. 464, 32 L. ed. 488	7
Knox vs. McElligott, 258 U. S. 546, 66 L. ed. 760	16, 26, 29
Leach's Estate, 282 Pa. 545	7, 8, 11
Levy vs. Wardell, 258 U. S. 542, 66 L. ed. 758	16
Lewellyn vs. Frick, 268 U. S. 238, 69 L. ed. 934	15, 16
Lowe vs. Harris, 22 L. R. A. 379 at 381	21
Lynch vs. Congdox, 1 Fed. (2d) 133	12

Cases:

	Page
Lyons Estate, In Re, 233 N. Y. 208; 135 N. E. 247	27
McCurdy vs. Canning, 64 Pa. 39	8
McIntosh's Estate, 289 Pa. 509	7
McKelways Estate, In Re, 221 N. Y. 15, 116 N. E. 348	27
Meritt vs. Whitlock, 200 Pa. 50	8
Meyer's Estate, 232 Pa. 95	7
Meyer's Estate, 232 Pa. 89	7
Milliken vs. United States, 282 U. S.—, 75 L. ed. 435	19
Murphy & Mercantile Trust Co., Executors	12
National Bank of Commerce vs. Jones, 12 L. R. A. (N. S.) 310 at 314	21
Nichols vs. Coolidge, 274 U. S. 531, 71 L. ed. 1184	13, 29
Ohio Buttery Co. vs. Hargrave, 84 Southern Rep. 276	9
O'Malley vs. O'Malley, 272 Pa. 528	7, 8
Parry's Estate, 188 Pa. 33	8
Pell, In Re, 171 N. Y. 48, 63 N. E. 789, 57 L. R. A. 540, at 542	19
Reinecke vs. Northern Trust Co., 278 U. S. 339, 73 L. ed. 339	24, 26, 27, 28
Rhodes' Estate, 232 Pa. 489	8
Rhoades' Estate, 277 Pa. 450	8
Saltonstall vs. Saltonstall, 276 U. S. 260, 72 L. ed. 259	24, 25
Shwab vs. Doyle, 258 U. S. 529, 66 L. ed. 747	16, 17
Slaymaker's Estate vs. Bank of Gettysburg, 10 Pa. 373	8
Sloan's Estate, 254 Pa. 346	7, 8, 11
Smith et al., Executors vs. Commissioner of Int. Rev., 6 U. S. Bd. of Tax Appeals 341	12
Stuckey vs. Keefe's Executors, 26 Pa. 397	7, 8
Sturges vs. Carter, 114 U. S. 511, 29 L. ed. 240, at 243	19
Tyler vs. United States, 281 U. S. 497, 74 L. ed. 991	6, 7, 9, 10, 12, 27

Cases: Page

Union Trust Co. vs. Wardell, 258 U. S. 537, 66 L. ed. 753 16
United States vs. Provident Trust Co., 35 Fed. (2nd.) 339 12
Untermyer vs. Anderson, 276 U. S. 440, 72 L. ed. 645 ..... 14, 15
Warburton vs. White, 176 U. S. 484, 44 L. ed. 555 9
Yeaton vs. United States, 5 Cranch, 281 29

Text-Books:

American and English Enc. 747 30
Ruling Case Law, Vol. 6, page 304 ..... 22, 23, 24

Statutes:

Revenue Act of 1916, 6 U. S. Comp. Statutes, page 7365
Sec. 202 ..... 7, 30, 33
Revenue Act of 1918 30
Revenue Act of 1919, U. S. Comp. Statutes, 1916, Vol. 1, page 1370
Sec. 402 (D) 33
Revenue Act of 1921, U. S. Comp. Statutes, 1916-1923, Supp., Vol. 2, page 2062
Sec. D 30, 33
Revenue Act of 1924
Sec. 301 31
Sec. 302 ..... 2, 11, 31, 32

Other Statutes:

Penna. Act of May 16, 1929, P. L. 1795 11

Supreme Court of the United States

October Term, 1930. No. 721.

DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, Twelfth District,

Appellant (below),

v.

DIME TRUST & SAFE DEPOSIT COMPANY, EXECUTOR of the Last Will and Testament of William B. Lewis, etc.,

Appellee (below).

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The case has not been decided by the Circuit Court of Appeals. The opinion of the District Court (R. 17) is reported in 30 F. (2d) 395.

JURISDICTION.

The certificate of the Circuit Court of Appeals was filed in this Court on February 11, 1931 (R. 29). On April

13, 1931, the parties filed a joint motion for a writ of certiorari to bring up the entire record and cause. This brief is prepared upon the assumption that this motion will be granted.

Jurisdiction is conferred by Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Does section 302 of the revenue act of 1924 require that the value of property held by husband and wife as tenants by the entirety, acquired prior to the effective date of the revenue act of 1916, be included in the gross estate of the tenant first dying for the purpose of the Federal estate tax?

2. Does section 302 of the revenue act of 1924 require that the value of property held by husband and wife as tenants by the entirety, acquired prior to the effective date of that Act but after the effective date of the revenue act of 1916, be included in the gross estate of the tenant first dying for the purpose of the Federal estate tax?

3. If the answer to either question be in the affirmative, had the Congress power to extend the cited taxing provision to such an estate so acquired?

STATUTES INVOLVED.

Section 302 of the Revenue Act of 1924, pp. 31 infra. Reference is made to similar provisions in all of the other Revenue Acts.

CONCISE STATEMENT OF CASE.

William B. Lewis married Anna Laura Lewis in 1886 (R. 16) and the marriage relation continued until his death, September 25, 1925 (R. 16). He died testate, a resident of Shamokin, Pennsylvania (R. 14-18). By his last will he appointed Dime Trust & Safe Deposit Company his executor (R. 14), and letters testamentary were granted to that Company which qualified and is acting as such (R. 14). The executor on August 5, 1926, filed with the Collector, the appellant, a Federal Estate Tax Return, (R. 15) including therein in Schedule D-1 "Jointly Owned Property Under Protest." (R. 15). The Commissioner and Collector of Internal Revenue of the United States exacted a tax of $18,915.12, from the Executor on the property held by entireties by the decedent and his surviving wife, which was paid under protest (R. 16). The property involved is enumerated in paragraph ninth of the plaintiff's statement of claim, (R. 3) which paragraph was incorporated by reference in the stipulations of fact (R. 3-15-19). There are 13 items of property, some of which were acquired prior to the effective date of the Revenue Act of 1916, some before the effective date of the Act of June 2, 1924, and the remaining items after the effective date of that Act. These items include real estate in Pennsylvania and in Florida, shares of the capital stock of a New Jersey corporation, mortgage bonds of a Pennsylvania corporation located at Shamokin, Pennsylvania, bonds and notes secured by mortgages on real estate, some of which were in Pennsylvania and some in Florida, unsecured promissory notes, household furniture, a saving account and checking account in bank in Pennsylvania.

The Government, in its brief, has adopted the following general classification which will be followed by us:

GROUP A.—PROPERTY HELD BY THE ENTIRETIES CREATED AFTER THE PASSAGE OF THE REVENUE ACT OF JUNE 2, 1924.

(6) A bond secured by mortgage of real estate, transferred to the decedent and his wife on May 1, 1925.

GROUP B.—PROPERTY HELD IN TENANCIES BY THE ENTIRETY CREATED BETWEEN THE DATE OF PASSAGE OF THE REVENUE ACT OF SEPTEMBER 8, 1916, AND THE DATE OF PASSAGE OF THE REVENUE ACT OF JUNE 2, 1924.

(1) A tract of land in Pennsylvania, deeded to the decedent and wife on August 12, 1922.

(2) A tract of land in Pensylvania, deeded to the decedent and wife on November 5, 1919.

(3) A tract of land in Florida, deeded to the decedent and wife on December 26, 1923.

(4) Four thousand shares of the capital stock in a New Jersey corporation, the original certificates for which were issued to the decedent and wife on September 10, 1921.

(5) Bonds of a water company located in Shamokin, Pennsylvania, acquired September 6, 1924. The stipulation recites: "They were purchased out of funds of William B. Lewis or Anna Laura Lewis on deposit in Dime Trust & Safe Deposit Company."

(7) Bond, secured by mortgage of real estate in Pennsylvania, dated February 16, 1923.

(8) Note, secured by mortgage of real estate in Florida, dated January 11, 1924.

(9) Note, secured by mortgage of real estate in Florida, dated April 25, 1924.

(10) Unsecured promissory note, dated May 4, 1925. It appears that the note was given for a Loan made from funds accumulated in the savings bank which were accumulated prior to June 2, 1924. (R. 19).

(13) Household furniture, valued at $2,075.00. It appears that it "was purchased with funds of William B. Lewis and Anna Laura Lewis about 1920 from the Savings Account in Dime Trust & Safe Deposit Company." (R. 19).

GROUP C.—BANK ACCOUNTS WHICH WERE HELD BY THE ENTIRETIES AND OPENED IN 1910.

(11) Item No. 11, consisting of saving account No. 3322 in Dime Trust & Safe Deposit Company, standing in the name of William B. Lewis or Anna L. Lewis, at the time of Mr. Lewis's death, showed a balance of $47,962.80, and the accrued interest thereon was $812.33. This savings account was opened in 1910 in the names of William B. Lewis or Anna Laura Lewis." (R. 6-7, 19).

(12) This is a checking account in the same bank. The account was opened in 1910 and the balance at the time of the decedent's death was $1,566.66. (R. 19).

At the time and times of the vesting of the title to each, every and all of the several items of property of William B. Lewis and Anna Laura Lewis enumerated and set forth in paragraph ninth of plaintiff's statement of claim, William B. Lewis and Anna Laura Lewis were husband and wife and the title to all of the items of real and personal property stood in the names of William B. Lewis and Anna Laura Lewis from the date of the inception of the title of the various items of property until the date of his death. (R. 19). On September 10, 1926, the tax was paid and on

the same date, the plaintiff filed with the Collector a claim for refund of the taxes so assessed and collected with the Commissioner. (R. 20). The Commissioner subsequently rejected the claim for refund in its entirety (R. 20) whereupon this suit was instituted in the District Court for the Middle District of Pennsylvania to recover the sum of $18,915.12, with interest from September 10, 1926. (R. 2). The Court, on February 2, 1929, directed that judgment be entered for the full amount of plaintiff's claim (R. 24) which judgment was entered March 1, 1929. (R. 25). The Collector appealed to the Circuit Court of Appeals of the Third Circuit and that Court, instead of deciding the case, certified the questions above stated to this Court for decision.

SUMMARY OF ARGUMENT.

An estate by entireties in Pennsylvania is one that arises whenever an estate vests in two persons, who being, when it so vests, husband and wife. It may exist in personal as well as real property, in choses in action as well as choses in possession. It is not effected by the so-called Married Women's Acts, it is not subject to the debts of one of the spouses, it cannot be severed without the consent of both husband and wife, it cannot be taken in execution for the debts of one of the parties, it does not pass to a Trustee in Bankruptcy of one of the parties, it is not encumbered by a lien against one of the spouses. It is not subject to the inheritance tax laws of Pennsylvania. It vests immediately upon its inception and upon the death of one of the spouses the other takes no new estate by the right of survivorship.

Since the decision of this Court in Tyler v. United States, 281 U. S. 497; 74 L. Ed. 991, it is conceded that the Commissioner had the right to include, for the purpose of

taxation, property acquired by the entireties subsequent to the passage of the Act of June 2, 1924. Of the property taxed there is however but one item covered by the Tyler case (p. 4 supra).

All other items of property became vested in the decedent and his wife prior to June 2, 1924, and the bank accounts became vested prior to the Act of 1916. Insofar as the Act of 1924 attempts to tax property acquired prior to its effective date it is unreasonable, arbitrary and capricious and amounts to confiscation and offends against the Fifth Amendment of the Federal Constitution.

1. NATURE AND INCIDENTS OF AN ESTATE BY ENTIRETY.

A tenancy by entireties is an estate held by husband and wife together so long as both live, and after the death of either, by the survivor so long as the estate lasts. The essential characteristic of the estate is that each spouse is seized of the whole or entirety and not of a share, moiety or divisible part. There is but one estate, and, in contemplation of law it is held by but one person.

Gasner v. Pierce, 286 Pa. 529;
Bramberry's Estate, 156 Pa. 628;
Sloan's Estate, 254 Pa. 346;
Beihl v. Martin, 236 Pa. 519;
Meyer's Estate, 232 Pa. 95;
Hilt v. Hilt, 50 Pa. Sup. Ct. 455;
O'Malley v. O'Malley, 272 Pa. 528;
Hoover v. Potter, 42 Pa. Superior Ct. 21;
Blease v. Andersen, 241 Pa. 198;
McIntosh's Estate, 289 Pa. 509;
Leach's Estate, 282 Pa. 545;
Meyer's Estate, 232 Pa. 89;
Hunt v. Blackburn, 128 U. S. 464; 32 L. Ed. 488;
Stuckey v. Keefe's Executors, 26 Pa. 397.

Each tenant is seized of the whole estate from its inception, and upon his death of one, while the right of survivorship remains to the other, that other takes no new estate.

Beihl v. Martin, 236 Pa. 519;
Leach's Estate, 282 Pa. 545;

"The quality of the estate is determined at its inception. It arises not out of the unity of person alone, but out of unity of person at the time of the grant."

Allen v. Lyon, 216 Pa. 604 at 606;
Hetzel v. Lincoln, 216 Pa. 60;
O'Malley v. O'Malley, 272 Pa. 528 at 533.

A tenancy by entireties cannot be severed by either the act of the husband or the wife, nor can the property held by entireties be seized by the creditors of one of the tenants in satisfaction of a debt.

Stuckey v. Keefe, 26 Pa. 397;
Beihl v. Martin, 236 Pa. 519;
Gasner v. Pierce, 286 Pa. 529;
O'Malley v. O'Malley, 272 Pa. 528;
McCurdy v. Canning, 64 Pa. 39;
Fleek v. Zillhaver, 117 Pa. 213;
Meritt v. Whitlock, 200 Pa. 50;
Rhodes's Estate, 232 Pa. 489.

An estate by entirety may exist in personalty as well as real property, in choses in action as well as choses in possession.

Bramberry's Estate, 156 Pa. 628;
Parry's Estate, 188 Pa. 33;
Rhoades Estate, 277 Pa. 450;
Slaymaker's Estate v. The Bank of Gettysburg, 10 Pa. 373;
Glick v. Cochens, 252 Pa. 56;
Sloan's Estate, 254 Pa. 346.

Among the items of property are a piece of real estate located in Florida and two mortgages secured on Florida real estate. (Items 3-8-9, R. 4-6). In Florida an estate by entirety exists to the same extent as it does in Pennsylvania.

English v. English, 63 Southern, 822;
Ohio Buttery Co. v. Hargrave, 84 Southern, 276.

This Court recognizes the rules of property arising under tenancies by the entireties in Pennsylvania and the rights and incidents of the parties therein. See *Tyler v. United States*, 281 U. S. 497; 74 L. Ed. 991; *Warburton v. White*, 176 U. S. 484; 44 L. Ed. 555; *Ed. Heinz, Yellow Pine Trustees v. Martin*, 268 U. S. 458; 69 L. Ed. 1050; *Clarke v. Clarke*, 178 U. S. 186, 44 L. Ed. 1028.

(2) PROPERTY ACQUIRED BY THE ENTIRETIES AFTER THE PASSAGE OF THE REVENUE ACT OF JUNE 2, 1924.

Since the decision of this Court in **Tyler v. United States**, 281 U. S. 497; 74 L. Ed. 991, it must be conceded that the Commissioner had the right to include, for purposes of taxation, property "acquired by the entireties subsequent to the passage of the Act of June 2, 1924." The only item of this group however which it is conceded is entirely covered by the Tyler case is item 6, supra, pg. 4. The water company bonds (Item 5, supra 4) and the promissory note (Item 10, supra 5) were purchased out of funds held by the entireties conceded by the Government to have belonged to the tenants by the entirety, prior to the enactment of the Act of 1924. (Brief for Collector 14.)

In **Blick v. Cochens**, 252 Pa. 56, bonds were purchased from a similar account and it was held that the bonds having been purchased with funds which had been deposited in the account of husband and wife belonged to the survivor the same as the money would have belonged to him if it had not been drawn from the Bank.

Since the Government concedes that these two items were purchased from funds belonging to the decedent and his wife prior to the passage of the Act their proper classification should be in group B. as property acquired prior to the passage of the Act of 1924, but after the passage of the Act of 1916. The purchase of the bonds and the taking of the note was simply a change in the form of investment and these items were not acquired in the sense that it was new property. It was simply a substitution of one form of property for another.

In the *Tyler* case it appeared affirmatively that the property taxed belonged to the decedent as the sole owner up to the time when the tenancy by the entirety was created. In the case at Bar it does not so appear. In the *Tyler* case and the cases decided therewith it appears that in each case the estate was created after the passage of the applicable Act and this was the ground upon which that case was decided.

Coolidge v. Long, 282 U. S. , 75 L. Ed. 308.

(3) PROPERTY ACQUIRED PRIOR TO THE PASSAGE OF THE REVENUE ACT OF 1924 BUT AFTER THE PASSAGE OF THE REVENUE ACT OF 1916.

The Act of June 2, 1924, (Section 301), provides: "a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 303), is hereby imposed upon the transfer of the net estate, of every decedent dying after the enactment of this Act. . . ."

Section 302 provides for "the inclusion in the gross estate of the decedent of the value at the time of his death, of all property, real or personal,

> "(a)—to the extent of the interest therein of the decedent at the time of his death, which after his death is subject to the payment of the charges against his estate

and the expenses of its administration and is subject to distribution as part of his estate."

"(e)—to the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, . . . in their joint names and payable to either or the survivor."

"(h)—Sub-divisions b-c-d-e-f and g of this section shall apply to transfers, trusts, estate, interests, rights, powers and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised or relinquished before or after the enactment of this Act."

Paragraph (h) of section 302 of the Act of 1924 attempts to apply the provisions of sub-division E of section 302 to property, the title to which was vested prior to the enactment of the Act, thereby making the Act retroactive insofar as the property acquired prior to the passage of the Act is concerned.

We have seen that an estate by entirety in Pennsylvania takes effect from its inception, that it cannot be affected by the actions of either spouse and that it is not subject to the debts of one of the parties.

The property in an estate by entireties belongs to the survivor and the personal representative of the spouse first dying has no right to the property nor is it subject to the payment of the charges against his estate and the expenses of its administration nor is it subject to distribution as part of his estate.

Sloan's Estate, 254 Pa. 346.

In Pennsylvania an estate by entirety is not subject to an estate or inheritance tax under the State laws.

Leach's Estate, 282 Pa. 545;
Act of May 16, 1929, P. L. 1795.

Paragraphs (a) and (e) of sec. 302 of the act must be read and construed together.

The property rights of the parties having become fixed at the inception of the estate by reason of the original instrument creating it, and that act having been fully consummated before the taxing statute was passed, there was no retreat open to decedent. He was not able to change it without the consent of his co-tenant.

At the time of the creation of these estates there was no law taxing an estate by the entirety upon the death of one of the spouses. The *Tyler* case is the first decision of this Court holding that an estate of that kind can be taxed under any act of Congress.

The decisions of the Board of Tax Appeals and of the Courts before which the question arose prior to that decision all held that an estate by entirety could not be taxed under any of the Acts of Congress.

Lucia E. Blount v. United States, 59 Ct. of Cl. 328;
Dyer et al., executors of the Est. of Chas. I. Hudson, 5 U. S. Bd. of Tax Appeals, R. 711;
James C. Murphy & Mercantile Trust & Safe Deposit Co., executors of John H. Windfelder, 5 U. S. Bd. of Tax Appeals, 952;
Harry A. Smith, et al., executors of Ed. Meinel, v. Commissioner of Internal Revenue, 6 U. S. Bd. of Tax. Appeals, 341;
United States v. Provident Trust Co., et al. 35 Fed. 2nd, 339, considered with the Tyler case;
Lynch v. Congdon, 1 Fed. 2nd, 133.

In the case at bar the record is silent as to whether or not the property originally belonged to one or both spouses. When this suit was tried there was no decision by this court or any other appellate court upon the subject. In the decisions of the Board of Tax Appeals and of those courts before whom the question arose, it was deemed immaterial

whether the property had been contributed by one or both spouses. The decisions were that no estate of this kind could be taxed no matter whether the estate originally belonged to one or both spouses. It was thought that when the decedent used his funds to create a tenancy by the entirety, he, for all practical purposes, made a gift as fully as if made outright. He no longer had control over the property; he could not recall any portion of it; he could not convey it or encumber it.

The estates referred to in Group B were fully created before the taking effect of the Act of June 2, 1924, under which the tax is here claimed.

In **Blodgett vs. Holden**, 275 U. S. 142, 72 L. E. 206, Mr. Justice Holmes says, in relation to the Revenue Act of 1924:

> "I think it tolerably plain that the act should be read as referring only to transactions taking place, after it was passed, when to disregard the rule 'would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways.'"

In Nicholas vs. Coolidge, 274 U. S. 531, 71 L. E. 1184, in relation to the Act of Congress here under consideration, this court says:

> "Certainly, Congress may lay an excise upon the transfer of property by death reckoned upon the value of the interest which passes thereby. *But, under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them.* Taxes are very real things and statutes imposing them are estimated by practical results."
>
> "This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to a confiscation and offend the 5th Amend-

ment. Brushaber v. Union P. R. Co., 240 U. S. 1, 24, 60 L. ed. 493, 504, L. R. A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; Barclay & Co. v. Edwards, 267 U. S. 442, 450, 69 L. ed. 703, 706, 45 Sup. Ct. Rep. 348. See also Knowlton v. Moore, 178 U. S. 41, 77, 44 L. ed. 969, 984, 20 Sup. Ct. Rep. 747. And we must conclude that Sec. 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

In **Blodgett vs. Holden**, supra, this court says:

"In Nichols v. Coolidge this court pointed out that a statute purporting to lay a tax may be so arbitrary and capricious that its enforcement would amount to deprivation of property without due process of law within the inhibition of the 5th Amendment. As to the gifts which Blodgett made during January, 1924, we think the challenged enactment is arbitrary and for that reason invalid. It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing."

In **Untermyer v. Anderson**, 276 U. S. 440, 72 L. E. 645, this court says:

"Two opinions were announced in Blodgett v. Holden. The one prepared by the present writer expressed the views of four of the eight justices who participated in the consideration of the cause. After quoting the pertinent provisions of the statute, etc., the opinion declared: 'So far as the Revenue Act of 1924 undertakes

to impose a tax because of the gifts made during January, 1924, it is arbitrary and invalid under the due process clause of the 5th Amendment.'"

"In the light of arguments advanced by counsel in the present cause the matter has been considered by all members of the court and a majority of them are of opinion that the gift tax provisions of the Act of 1924 here challenged must be construed as applicable to gifts made during the entire calendar year 1924. And, further, that so far as applicable to bona fide gifts not made in anticipation of death and fully consummated prior to June 2, 1924, these provisions are arbitrary and invalid under the due process clause of the 5th Amendment."

In the **Untermyer** case the gift was made while the bill containing the questioned provisions was in the last stages of progress through Congress.

In the case at Bar the property vested in the tenants by entirety, in most instances years before the Act of 1924 went into effect.

In **Lewellyn v. Frick**, 268 U. S. 238, 69 L. E. 934, this court says:

"Acts of Congress are to be construed, if possible, in such a way as to avoid grave doubts of this kind. Panama R. Co. v. Johnson, 264 U. S. 375, 390, 68 L. E. 748, 754. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, *but the general principal 'that laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that, if known, might have induced those concerned to avoid it, and to use their money in other ways.*"

Whether or not a particular measure is invalid solely because it is retroactive, this court has consistently placed its stamp of disapproval on retroactive construction of taxing statutes in cases where no other construction was open.

Shwab vs. Doyle, 258 U. S. 529, 66 L. E. 747;
Lewellyn vs. Frick, supra;
Levy vs. Wardell, 258 U. S. 542, 66 L. E. 758;
Knox vs. McElligott, 258 U. S. 546, 66 L. E. 760;
Union Trust Co. vs. Wardell, 258 U. S. 537, 66 L. E. 753.

In the case of **Levy vs. Wardell**, supra, it is said:

"At the time of the transfers, there was no law of the State of California imposing any transfer or inheritance tax, nor was there a law of the United States to that effect, and all of the transfers were intended to take effect in possession and enjoyment upon their date. The act of Congress, therefore, should not be construed to be retroactive, and, if so construed, was in violation of the Constitution of the United States, in that it would take the property of plaintiffs without due process of law, in violation of the 5th Amendment, and would not be, besides, a transfer tax or an indirect tax, but would be a direct tax thereon, in violation of article 1, section 9, subdivision 4 of the Constitution of the United States because not laid in proper relation to census or enumeration, as therein provided."

In **Knox v. McElligott**, 258 U. S. 546, 66 L. E. 760, it is held that:

"A joint tenancy created prior to the Act of September 8, 1916, was not comprehended by the provisions of that act imposing a tax upon the transfer of the net estate of every decedent dying after the passage of that act."

In **Shwab vs. Doyle**, supra, this court quotes with approval from Story's Constitution, sec. 1398, "Retroactive laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation or with the fundamental principles of the social compact."

In **Coolidge vs. Long**, U. S. , 75 L. E. 308, decided by this court, February 24, 1931, Mr. Justice Butler, says:

> *"No act of Congress has been held by this court to impose a tax upon possession and enjoyment, the right to which had fully vested prior to the enactment."* (Italics ours).
>
> *"This court has not sustained any state law imposing an excise upon mere entry into possession and enjoyment of property, where the right to such possession and enjoyment upon the happening of a specified event had fully vested before the enactment."* (Italics ours).
>
> "This court has held that the Revenue Act of 1924, 43 Stat. at L. 253, chap. 234, sec. 319-324, in so far as it undertook to impose a tax on gifts fully consummated before its provisions came before Congress (Blodgett v. Holden, 275 U. S. 142, 72 L. ed. 206, 48 S. Ct. 105) or before its passage (Untermeyer v. Anderson, 276 U. S. 440, 72 L. ed. 645, 48 S. Ct. 353), was arbitrary and repugnant to the due process clause of the 5th Amendment. In Nichols v. Coolidge, 274 U. S. 531, 71 L. ed. 1184, 52 A. L. R. 1081, 47 S. Ct. 710, we considered the trust deed of Mrs. Coolidge that is now before us. The question in that case was whether the value of the property so conveyed prior to the enactment should be included in her estate for the purpose of ascertaining the federal estate tax thereon. We said (p. 542):
>
> 'This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the 5th Amendment.

Brushaber v. Union P. R. Co., 240 U. S. 1, 24, 60 L. ed. 493, 504, L. R. A. 1917D, 414, 36 S. Ct. 236, Ann. Cas. 1917B, 713; Barclay & Co. v. Edwards, 267 U. S. 442, 450, 69 L. ed. 703, 45 S. Ct. 348. See also Knowlton v. Moore, 178 U. S. 41, 77, 44 L. ed. 969, 20 S. Ct. 747. And we must conclude that sec. 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of the property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary capricious and amounts to confiscation'."

"By the deed of each grantor one-fifth of the remainder was immediately vested in each of the sons subject to be divested only by his death before the death of the survivor of the settlors. It was a grant in praesenti to be possessed and enjoyed by the sons upon the death of such survivor. Blanchard v. Blanchard, 1 Allen, 223; Clarke v. Fay, 205 Mass. 228, 27 L. R. A. (N. S.) 454, 91 N. E. 328; McArthur v. Scott, 113 U. S. 340, 379, 28 L. ed. 1015, 1027, 5 S. Ct. 652, and cases cited. And see United States v. Fidelity Trust Co., 222 U. S. 158, 56 L. ed. 137, 32 S. Ct. 59; Henry v. United States, 251 U. S. 393, 64 L. ed. 322, 40 S. Ct. 185. The provision for the payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoyment. The settlors divested themselves of all control over the principal; they had no power to revoke or modify the trust. Coolidge v. Loring (235 Mass. 223, 126 N. E. 276). Upon the happening of the event specified without more, the trustees were bound to hand over the property to the beneficiaries. Neither the death of Mrs.

Coolidge nor of her husband was a generating source of any right in the remaindermen. Knowlton v. Moore 178 U. S. 41, 56, 44 L. ed. 969, 975, 20 S. Ct. 747. Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remaindermen, including possession and enjoyment upon the termination of the trusts, were derived solely from the deeds. The situation would have been precisely the same if the possibility of divestment had been made to cease upon the death of a third person instead of upon the death of the survivor of the settlors."

Milliken v. United States, 282 U. S. , 75 L. Ed. 435, was decided upon the ground that the gift was made in contemplation of death and this court says that, "That is controlling here since it is not challenged by any facts appearing of record".

In **Sturges v. Carter**, 114 U. S. 511, 29 L. Ed. 240, at 243, the Supreme Court says, quoting from Society v. Wheeler, 2 Gall. 139:

"Mr. Justice Story thus defines a retroactive, or, as he calls it, a retrospective law: 'Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective'."

French v. Deen, 24 L. R. A. 387 at 391;
Hamilton v. Roush Bros., 19 L. R. A. 584 at 586.

In **Re Pell**, 171 N. Y. 48, 63 N. E. 789, 57 L. R. A. 540 at 542, it is said:

"The appellant insists that this amendment imposing a succession or transfer tax upon estates which vested

April 14, 1863, is retroactive, and attempts to tax estates and rights which had vested long before its enactment; that, this being so, it violates the Constitution of the United States, which forbids any law impairing the obligations of contracts, and also the Constitution of the state of New York, which prohibits the taking of private property for public use without compensation. The appellant does not attack the constitutionality of the law simply because it is retroactive, but for the reason that it is both retroactive and effective to impair vested rights."

"The language of this amendment of 1899 would seem to include all remainders created by deed or will which come within the restrictive time limitation therein fixed. Legislation which impairs the value of a vested estate is unconstitutional."

At 543:

"This Court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property, but upon the right of succession. It therefore follows that where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation. In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of the life tenant, in which event the children of the one so dying would be substituted. If these estates in remainder were vested prior to the enactment of the transfer tax act, there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to di-

minish the value of these vested estates, to impair the obligation of a contract, and take private property for public use without compensation."

"Impair means to make worse, to diminish in quantity, value, excellence, or strength, to lessen in power, to weaken, to enfeeble, to deteriorate." Brearly School v. Ward, 40 L. R. A. (N. S.) 1215, at 1220.

"No law which divests property out of one person and vests it in another for his own private purposes without the consent of the owner, has never been held, a constitutional exercise of legislative power in any state of the Union. Cooley Const. Lim. 165; Wilkinson v. Leland, 27 U. S. 2 Pet. 658, 1 L. ed. 553; Satterlee v. Matthewson, 27 U. S. 2 Pet. 380, 1 L. ed. 458; Hoke v. Henderson, 15 N. S. 4, 25 Am. Dec. 677; Wales v. Stetson, 2 Mass. 143, 3 Am. Dec. 39; Calder v. Bull, 3 U. S. 3 Dall. 394, 1 L. ed. 561; Dash v. Van Keek, 7 Johns, 507, 5 Am. Dec. 291; U. S. Const. art. 1, 10; N. C. Const, art. 1, 17, Butler v. Pennsylvania, 51 U. S. 10 How. 416, 13 L. ed. 478; Fletcher v. Peck, 10 U. S. 6 Cranch, 137, 3 L. ed., 178; Stanmire v. Taylor, 48 N. C. 207, 214; King v. Hunter, 65 N. C. 603; 6 Am. Rept. 754, Wesson v. Johnson, 66 N. C. 189, 1 Kent, Com. 455; Stanmire v. Powell, 35 N. C. 312."

"Even in England, where there are no written constitutions, a statute will not commonly be construed to divest vested rights, and, when giving it a retrospective effect may lead to that result, it is allowed to operate prospectively only. Moore v. Phillips, 7 Mass. & W. 536; Couch v. Jeffries, 4 Burr, 2462." Lowe v. Harris, 22 L. R. A. 379 at 381.

In **National Bank of Commerce v. Jones**, 12 L. R. A. N. S. 310 at 314, it is said:

"An Act of the legislature which seeks to impair the

obligation of a contract, or to impair or destroy vested property rights, is unconstitutional and void. Toledo D. & R. R. Co. v. Hamilton, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. Rep. 546; Crother v. Fidelity Ins. Trust & S. D. Co., 29 C. C. A. 1, 42 U. S. App., 701, 85 Fed. 43; Yeatman v. King, 2 N. D. 428, 33 Am. St. Rep. 797, 51 N. W. 721, Kilpatrick v. Kansas City & B. R. Co., 41 Am. St. Rep. 758, note; Giles v. Stanton, 86 Tex. 620, 26 S. W. 615; 1 Jones, Liens, 701. These authorities lay down the doctrine that a mortgage lien constitutes a vested property right, and, after it has attached, the legislature has no power to create a lien superior to the vested interest, or to provide that such vested lien shall be made inferior to a lien subsequently created; and we think this rule sound, and in harmony with reason and justice."

In Crump v. Guyer, 2 A. L. R. 331, the Court says:

"A vested right is the power to do certain actions or possess certain things lawfully, and is substantially a property right, and may be created either by common law, by statute, or by contract. And when it has been once treated, and has become absolute it is protected from the invasion of the legislature by those provisions in the Constitution which apply to such rights. And a failure to exercise a vested right before the passage of a subsequent statute which seeks to divest it, in no way affects or lessens that right."

In 6 R. C. L. pg. 304, it is said:

"This constitutional provision covers laws which create a right where none before existed and which relate back so as to confer on a party the benefit of

such right, and covers also all such laws as take away or impair any vested right acquired under existing laws, or create a new obligation, or impose a new duty, or attach a new disability in respect to transactions or considerations already past."

At 305:

"If a retrospective act which is neither an ex post facto law nor one impairing the obligation of a contract should nevertheless operate so as to take away a right of property, it may still be unconstitutional and void, not because it is retrospective, but by reason of its repugnancy to constitutional provisions guaranteeing due process of law."

At 306:

"It frequently occurs in the consideration of questions of constitutional law that the validity of a single statute may depend on the application of numerous principles and the weighing of conflicting interests and rights. This is well illustrated in the case of vested rights. A law may be unconstitutional through its retrospective operation, whereby it impairs vested rights."

At 307:

"Legislation which impairs vested rights may likewise be invalid as amounting to a taking of property without due process of law."

"Nevertheless statutes retrospective in their character and operation, directly affecting and divesting vested rights, are very generally considered as founded on unconstitutional principles, and consequently inoperative and void."

"Irrespective of any express prohibition as to the enactment of retrospective laws and, in consequence laws which retroactively divest vested rights, the broad proposition has been laid down that the legislature cannot impair or destroy vested property rights and that even if a law is intended simply to change the remedy or procedure it is void if in fact it impairs vested rights."

At 310:

"While there is in the federal constitution no express guaranty as to vested rights, such rights are nevertheless fully protected by the provisions that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation."

The cases heretofore relied on principally by the Government to sustain a tax of the kind here in question have been Chase National Bank v. United States, 278 U. S. 327, 73 L. E. 405, Reinecke v. Northern Trust Co., 278 U. S. 339, 73 L. Ed. 410, Saltonstall v. Saltonstall, 276 U. S. 260, 72 L. Ed. 259. The Chase National Bank and Northern Trust Company cases are not controlling. In the Chase National Bank case the decedent took out policies of insurance on his life after the effective date of the Revenue Act of 1921, and died while the Act was still in effect. In the suit to recover the tax resulting from including the proceeds of such policies in decedent's estate, it was claimed, and conceded by this Court, "that the interest of the beneficiaries in the insurance policies effected by decedent 'vested' in them before his death."

The Court said:

"But until the moment of death the decedent retained a legal interest in the policies which gave him the

power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them."

"A power in the decedent to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefits of his creditors, *Cohen v. Samuels*, 245 U. S. 50; 38 S. Ct. 36; 62 L. ed. 143 (See Burlingham v. Crouse, 228 U. S. 459, 33 S. Ct. 564; 57 L. Ed. 920; 46 L. R. A. (N. S.) 148), and which may, under local law applicable to the parties here, subject them in part to the payment of his debts, Domestic Relations Law, N. Y. (chapter 14, Consol. Laws), 52; *Kittel v. Domeyer*, 175 N. Y. 265, 67 N. E. 433; *Guardian Trust Co. v. Straus*, 139 App. Div. 884; 123 N. Y. S. 852, affirmed 201 N. Y. 546; 95 N. E. 1129, is by no means the least substantial of the legal incidents of ownership, and its termination at his death so as to free the beneficiaries of the policy from the possibility of its exercise would seem to be no less a transfer within the reach of the taxing power than a transfer effected in other ways through death."

After referring to *Saltonstall v. Saltonstall*, 276 U. S. 260, to the effect that the freeing of a remainder interest from the possibility of the exercise of a power of disposition was the appropriate subject of a succession tax, the opinion in the *Chase* case proceeds as follows:

"We think that the rule applied in *Saltonstall v. Saltonstall*, supra, to a succession tax is equally applicable to a transfer tax where, as here, the power of *disposition is reserved exclusively to the transferor* for his own benefit. Such an outstanding power *residing exclusively in a donor to recall a gift after it is made*

is a limitation on the gift *which makes it incomplete as to the donor* as well as to the donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers." (Italics ours.)

In the *Northern Trust* case, the instruments creating two trusts which it was held should be included in the gross estate, reserved to the settlor alone the power of revocation, upon the exercise of which the trustee was required to return the trust corpus to him. It was argued that because these trusts were created in 1903 and 1910, the taxing statute if applied to them would be unconstitutional and void, because retroactive. The court rejected this contention saying:

> "*a transfer made subject to a power of revocation in the transferor,* terminable at his death, is not complete until his death. Hence section 402, as applied to the present transfers, is not retroactive since his death follows the passage of the statute." (Italics ours.)

The situation is different in tenancies by the entirety and joint tenancies, for, as pointed out above, the gift creates property rights which are beyond recall. This is recognized in *Knox v. McElligott,* 258 U. S. 546, where a joint estate was created in 1912 and upon the death of one of the decedents in 1917, one-half of the jointly owned property was returned as estate of the decedent. The Commissioner added the other half to the value of the estate and asserted a tax thereon. The Supreme Court, in holding that the Commissioner erred, quoted from the decision of the District Court as follows:

> "At the time the statute was passed Cornelia Kissam's interest belonged to her. . . . From the structure

of the Act to say that the measure of the tax is the extent of the interest of both joint tenants is, in effect, to say that a tax will be laid on the interest of Cornelia in respect of which Jonas had in his lifetime no longer either title or control."

To the same effect are decisions of the New York courts interpreting the State Transfer Tax Act which, like the Federal Estate Tax Act, imposes a tax on transfers and provides that in the case of property held jointly or in Entirety, "upon the death of one of such persons the right of the surviving tenant . . . shall be deemed a taxable transfer." The courts of New York have consistently held that the statute was unconstitutional and violated the Fourteenth Amendment in so far as it attempted to tax such tenancies created prior to the passage of the act. See *In Re Lyons Estate*, 233 N. Y. 208; 135 N. E. 247; *In Re McKelways Estate*, 221 N. Y. 15, 116 N. Y. 348; *In Re Carnegies Estate*, 203 App. Div. 91; 196 N. Y. Supp. 502.

In the **Tyler** case this Court says that the evident and legitimate aim of Congress was to prevent an avoidance, in whole or in part by an estate tax by this method of disposition during the lifetime of the spouse who owned the property. We have pointed out above that there was no Act of Congress retroactively affecting the estates by entirety in this case. We have shown that the decisions of the Board of Tax Appeals and of the Courts, except the Tyler case in the Circuit Court of Appeals for the Third Circuit, 33 Fed. 2nd, 724, had all decided the tax could not be imposed. Obviously, one cannot be charged with attempting to avoid a tax which was not in existence when he created the estate.

It is also interesting to consider the five trusts in *Northern Trust Company* that the Court refused to include in the gross estate of the decedent. In these

cases the grantor of the trust reserved no power to change the trust except with the acquiescence of the beneficiary whose interest the Court says was adverse and "the shifting of the economic interest of the trust property which was the subject of the tax was thus complete as soon as the trust was made." The court in disposing of this feature of the case stated that sections 401 and 402, when read together, indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death where he has retained no control, possession, or enjoyment, and that the provision in section 402 (c) which includes transfers to take effect in possession or enjoyment at or after his death includes only those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under section 401. It was the ability of the decedent to place himself in *status quo* which caused the court to include the first two trusts, and the fact that all effective control had been lost in the case of the other five trusts which necessitated their exclusion. And so with entireties. All control was lost by the original instruments.

When the estates by entireties in the case at Bar were created the decedent then and there made a gift of such portion of the property contributed by him. He could not withdraw it by his own act as in the *Chase National* and *Northern Security Company*, cases. His inability to recall the transaction makes it, as to him, as complete a gift as if it had been out right.

GROUP C—PROPERTY ACQUIRED PRIOR TO THE PASSAGE OF THE ACT OF 1916.

This group involves the saving and checking accounts in Bank. These were opened in 1910 and in that sense acquired at that time.

The case of **Lucia E. Blunt v. United States**, 59 Ct. of Cls. 328 at 347, holds that the Act of 1916 is not retroactive. In that case the property was acquired prior to passage of the Act of 1916. The case was appealed by the Government to this Court and afterwards on its motion the appeal was dismissed.

Knox v. McElligott, supra, holds that a joint tenancy created prior to the Act of September 18, 1916, was not comprehended by the provisions of that Act imposing a tax upon the transfer of the net estate of every decedent dying after the passage of that Act.

In **Nichols v. Coolidge**, the Revenue Act of 1919 was under consideration and it was there held that that act was not retroactive.

The Acts of 1916, 1918 and 1921, were repealed without any saving clauses. The repeals were absolute. The general rule is that where a statute is repealed without a re-enactment of the repealed law in substantially the same terms and there is no saving clause or a general statute remitting the effect of the repeal, the repealed statute in regard to its operative effect is considered as if it had never existed except as to matters and transactions passed and closed, 25 R. C. L. 932, and there can be no vested right in any law which precludes its change or repeal. Id. 910.

Where an Act expires or is repealed, it is, as its operative effect considered, in the absence of a provision to the contrary, as if it had never existed, except as to matters and transactions, passed and closed. As to all future matters, or steps yet to be taken, the repealed statute upon which they are passed is treated as utterly obliterated. Endlich on Statutes, Section 478.

Yeaton v. U. S., 5 Cranch, 281;
Hamilton Bank v. Dudley, 2 Peters, 492.

"The repeal of a statute in the absence of a saving clause, necessarily divests and destroys all inchoate interests which have arisen under it."

Amer. and Eng. Enc. 747.

The appellant argues in his brief that notwithstanding the repeal of the prior Acts, the provisions of the Act of 1924 in respect of tenancies by the entirety should be construed as a continuation with certain modifications of the Revenue Acts of 1916, 1918 and 1921, and that Congress never intended to impair the liability for taxes created by those Acts which, though repealed, were instantly re-enacted and continued in force without interruption.

The answer to this proposition is

(a) The Government acquired no vested rights whatever in the Acts of 1916, 1918 and 1921.

(b) These Acts were repealed absolutely and the provisions thereof stricken from the Statutes. The provisions of those Acts could not be invoked except as to transactions passed and closed at the dates of their repeal.

(c) None of the prior Acts, as above shown, were retroactive.

The Act of 1924 is the first Act which attempts to legislatate retroactively. Insofar as it attempts to do this it is unconstitutional and void in that it is capricious and confiscates the property of the surviving spouse.

Respectfully submitted,

CHARLES C. LARK,
Attorney for Appellee.

Shamokin, Pa.,
April, 1931.

APPENDIX.

The Act of 1924, Section 301 provides for the levying of

"A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 303), is hereby imposed upon the transfer of the net estate, of every decedent dying after the enactment of this Act, whether a resident or non-resident of the United States; (here follow the percentages.)"

(b) "The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy or succession taxes actually paid to any state or territory or the District of Columbia in respect of any property included in the gross estate. The credit allowed by this sub-division shall not exceed 25 per centum of the tax imposed by this Section."

Section 302 provides:—

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated,—"

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate; . . .

(e) . . . To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, . . . in their joint names and payable to either or the survivor, except such part thereof as

may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth; PROVIDED, that where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or moneys' worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person; . . .

(h) Sub-divisions (b), (c), (d), (e), (f) and (g) of this Section shall apply to the transfers, trusts, estates, interests, rights, powers and relinquishment of powers as severally enumerated and described therein, whether made, created, arising, existing, exercised or relinquished before or after the enactment of this Act."

The Act of November 23, 1921, U. S. Compiled Statutes, 1916-1923, Supplement, Volume 2, page 2062, Section D, provides for

"a tax on the net estate of a decedent to the extent of the interest therein held jointly or as tenants in the entirety," etc.

From here on the language is the same as the Act of 1924, down to the last proviso which reads as follows:—

"Provided, further, that where any property has been acquired by gift, bequests, devise or inheritance or as a tenancy in the entirety by the decedent and spouse or where so acquired by the decedent or any other person as joint tenants their interests are not

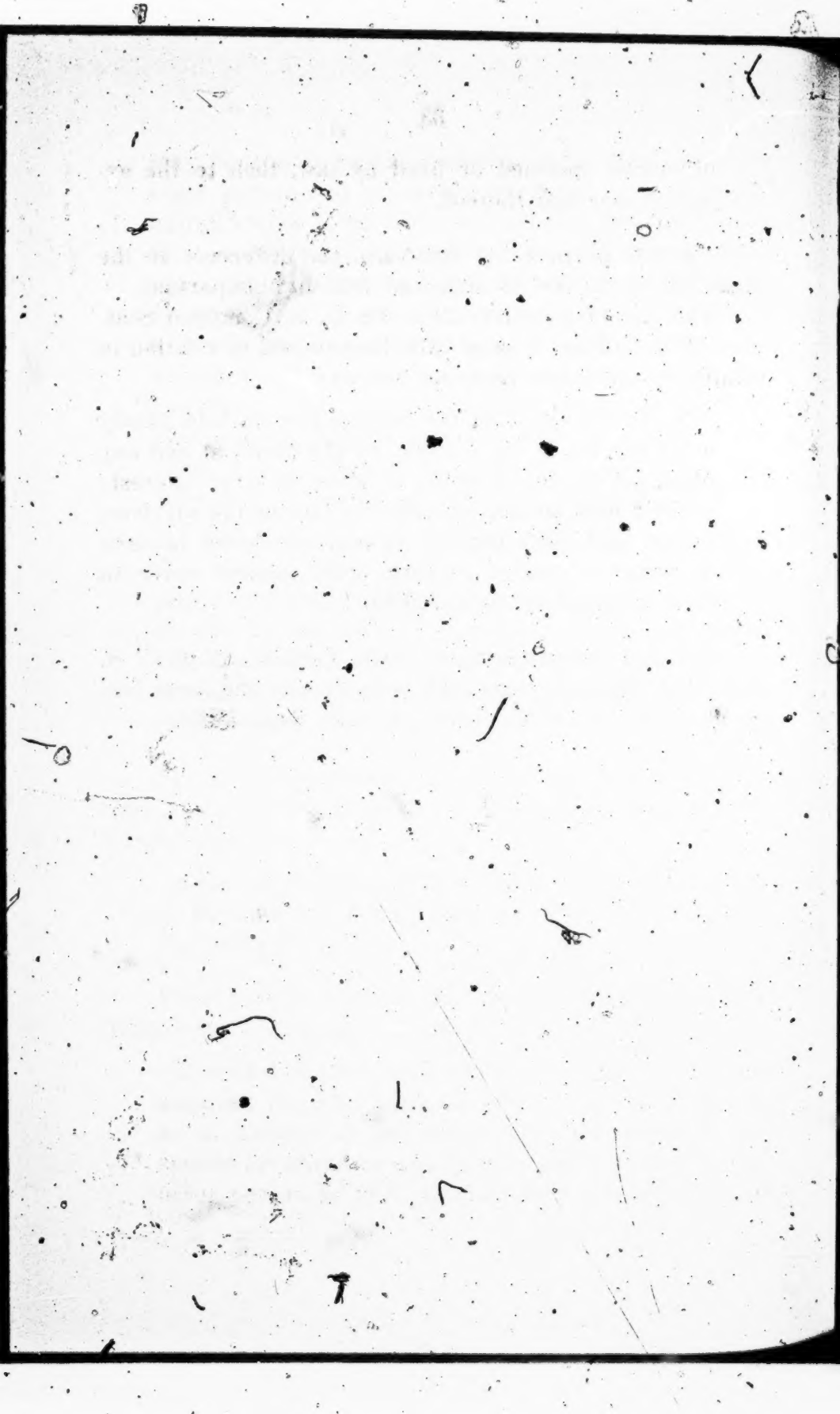
otherwise specified or fixed by law, then to the extent of one-half thereof."

For the purposes of this case, the difference in the language of the Act of 1924 and 1921 is unimportant.

The Act of February 24, 1919, U. S. Compiled Statutes, 1916, Volume 1, page 1370, Section 402 in relation to estates by entireties reads as follows:

"D—To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other interests in their joint names, payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person never to have belonged to the decedent."

The Act of September 8, 1916, Section 202, 6 U. S. Compiled Statutes, page 7365 is in exactly the same language as the Act of February 24, 1919, Section 202.



CORRECTED COPY

See pages, 1,2,

SUPREME COURT OF THE UNITED STATES.

No. 18.—October Term, 1931.

David W. Phillips, Collector of Internal Revenue, Twelfth District, *vs.* Dime Trust & Safe Deposit Company, Executor of the Last Will and Testament of William B. Lewis, etc.

On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

[November 23, 1931.]

Mr. Justice Stone delivered the opinion of the Court.

This suit was brought in the District Court for the Middle District of Pennsylvania, by the executor, to recover federal estate taxes alleged to have been illegally exacted. A jury having been waived, the court found the facts as stipulated and gave judgment against the collector. 30 F. (2d) 395. Upon appeal, the Court of Appeals for the Third Circuit, without deciding the case, certified here the questions involved, and, on joint motion of the parties, this Court ordered up the entire record. Jud. Code 239.

The only controversy presented relates to taxes levied and collected with respect to thirteen items of property, real and personal, concededly held by decedent and his wife as tenants by the entirety at his death in 1925. The applicable taxing statute is § 302 of the Revenue Act of 1924, 43 Stat. 253, 304, which provides that the gross value of the decedent's estate subject to tax shall include all property:

"(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: . . ."

This provision, without any variation of present significance, re-

was in force under

the 1916 and successive revenue acts. § 202, Rev. Act of 1916, 39 Stat. 756, 777-778; [illegible], Rev. Act of March 3, 1917, 39 Stat. 1000, [illegible] § 402, Rev. Act of 1918, 40 Stat. 1057, 1097; § 402, Rev. Act of 1921, 42 Stat. 227, 278.

The thirteen items of property with respect to which the tax was imposed may be classified in three groups, (1) property held upon tenancies by the entirety created after the effective date of the Revenue Act of 1924, (2) property held upon tenancies by the entirety created after the Revenue Act of 1916 and before the effective date of the Revenue Act of 1924, and (3) bank accounts opened in 1910 in the joint names of decedent and his wife, in which there were deposit balances at the date of his death.

The district court accepted the contention of the taxpayer that the nature of the estate by the entirety, and particularly the interest in it of a surviving tenant, are such as to preclude the imposition of death or transfer taxes measured by the value of the interest which ceases at the death of either tenant, and that the tax, if deemed to be upon property, is a direct tax not apportioned, forbidden by Art. I, § 2, Clause 3, and § 9, Clause 4, of the Constitution. After the decision of the district court, this contention was considered and rejected by this Court in *Tyler* v. *United States*, 281 U. S. 497, holding that a like tax imposed under § 202 (c), Rev. Act of 1916, was a valid indirect tax, measured by the value of the property, rights in which devolved upon the surviving tenant upon the happening of an event, the death of the other tenant by the entirety.

The controlling force of that decision is acknowledged as to the items of property in Group (1), acquired after the passage of the taxing act, and as to them it is conceded that the tax was rightly levied.

But it is urged that the tax imposed with respect to Groups (2) and (3) is invalid: As the creation of the tenancies by the entirety antedated the taxing act, and the earlier corresponding sections had been repealed, it is insisted that the statute is given a retroactive operation, such as that condemned by this Court in *Nichols* v. *Coolidge*, 274 U. S. 531; *Untermeyer* v. *Anderson*, 276 U. S. 440; *Coolidge* v. *Long*, 282 U. S. 582. As § 302 (h) of the Act of 1924 specifically makes the quoted provision of sub-

division (e) applicable to estates created or existing before the passage of the statute, the question presented is not one of its construction or applicability, but of the power of Congress to impose the tax. The Government argues that the tax was laid on the devolution of rights upon the wife at the death of her husband after the passage of the Act, and that therefore the statute was not applied retroactively, even though the estate was created before its enactment. Without foreclosing consideration of this contention at another time, we find it unnecessary now, in view of the facts of the present case, to pass upon it.

Group 2. The tenancies in all of the items of the second group were created after the passage of the 1916 Revenue Act. Congress had by that act adopted a system of death taxes, embracing, as it lawfully might, estates by the entirety. As was pointed out in *Tyler* v. *United States, supra,* pp. 503, 505, such estates are appropriate subjects of death taxes and the taxation of them is a suitable measure to prevent evasion of a system of taxation levied on estates passing at death by will or inheritance. In both respects they resemble gifts made in contemplation of death, likewise taxed by the estate tax provisions of the 1916 and later revenue acts. The considerations which led us, in *Milliken* v. *United States,* 283 U. S. 15, to uphold taxation of gifts in contemplation of death, made after the 1916 Act and before that of 1918, at the higher rate of the latter act, are equally applicable here. The knowledge available before the creation of the estate that it was embraced within an established taxing system and that its taxation, on the same basis and in the same manner as decedents' estates, was an essential part of the system to prevent evasions, relieves the present tax of the objection that it is arbitrarily retroactive.

Group 3. Although the bank accounts were opened before the passage of the Revenue Act of 1916, the record does not disclose whether the deposits, which were the sources of the credit balances at the time of the decedent's death, were made before or after 1916. If after, the tax was rightly laid, for reasons already stated, which support the tax with respect to the items in Group 2. As the suit is brought to recover taxes already paid, the presumption is that they were lawfully assessed and the burden rests on the

taxpayer to prove the facts which establish their illegality. *Miles Bement Pond Co.* v. *United States*, 281 U. S. 357, 361; *Reinecke* v. *Spalding*, 280 U. S. 227, 232. As the taxpayer has failed to sustain the burden in this respect or to show that the wife had originally owned or paid for any of the items or to present any facts to support a recovery other than those stated, the judgment is

Reversed.

A true copy,

Test:

Clerk, Supreme Court, U. S.